

# **IMPLIED TERMS IN THE CONTRACT OF SALE OF GOODS**

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**Thesis is submitted submitted in accordance with the requirements of the  
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**I certify that this Thesis consists solely of my own original work,  
and that all the sources upon which I draw have been identified.**



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# UNIVERSITY OF EDINBURGH

## ABSTRACT OF THESIS (Regulation 3.5.10)

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This thesis is on the law of implied warranties in the sale of goods in the United Kingdom and Malaysia. The first chapter discusses the history of the law of sale which dated back to the Roman law. It was received into Europe and England through the law merchant. The law merchant and the common law then developed the law on implied warranties

Chapter two consists of a discussion on the codification of the law of sale in the United Kingdom in the nineteenth century and also the problems that were created by the Sale of Goods Act 1893, in particular in relation to implied warranties.

The subsequent three chapters, three, four and five, are on implied warranties of conformity with description, merchantable quality and fitness for purpose, respectively. Elements in the relevant provisions are discussed in relation to decided cases. A comparison is made with the Uniform Commercial Code and the Vienna Convention on the International Sale of Goods.

The law on exemption clauses is discussed in chapter six. Chapter seven is a review of the implied warranties in the contracts of sale of goods in other common law countries like the United States of America, Australia and New Zealand.

Finally, in chapter eight, the study turns to consider the Malaysian experience on the subject, highlighting the problems and possible solutions.



# INTRODUCTION

This is a thesis on the implied warranties in the sale of goods in the United Kingdom and Malaysia. Its purpose is to examine whether they provide sufficient safeguards to consumers. The study is primarily about English law because this is the basis of Malaysian law. This English legal tradition dates back to the early nineteenth century when a Charter of Justice was granted to Penang, thus introducing English law into the colony. Comparison is also made with other laws, such as the Uniform Commercial Code of the United States of America, the Vienna Convention on the International Sale of Goods, and the laws of other Commonwealth countries like Australia and New Zealand. The approach is by way of a historical narrative to identify the origin and development of the law of implied warranty. This shows that the law took shape against a social and commercial background very different from that of today, and in particular from that of Malaysia.

The first chapter discusses the history of the law of sale, showing that it is basically of Roman origin, mediated through the law merchant to become part of the English law. A brief historical survey shows the relationship between the law merchant and the common law itself, the two strands that went into the making of the English law of implied warranties. This was finally codified in the Sale of Goods Act 1893.

Chapter two begins with an examination of the law in Scotland prior to 1893 because Scotland had a different law compared to England. It proceeds to discuss the codification of the law of sale in the United Kingdom in the nineteenth century. Discussion is made of the Mercantile Law (Amendment) Act 1856, and the Sale of Goods Act 1893. The latest effort at reforming the law is the Sale and Supply of



Goods Act 1994. For a period of a decade, the law of implied warranties had undergone so many changes and these are traced in this chapter.

Chapters three, four and five take a detailed look at the implied conditions of conformity with description, merchantability and fitness for a particular purpose respectively. These chapters analyse the elements of the relevant provisions and their application through the cases, identifying the problem to which the 1893 Act gave rise. A comparative study is made with the Uniform Commercial Code and the Vienna Convention on the International Sale of Goods, the most recent international instrument on the subject.

The sixth chapter contains a discussion of exemption clauses and their significance in the law of sale. The main theme of this chapter is the effectiveness and the limitations of such clauses. A comprehensive study is made of the British Law Commissions' Reports on the subject, their proposals and the amendments made to the law regarding exemption clauses. This chapter also highlights the 1993 EC Directive on unfair terms in consumer sales.

The seventh chapter is a review of the treatment of contracts of sale in other common law countries like the United States of America, Australia and New Zealand. The focus is on the problems encountered by them in developing their law of sales from the model provided by the Sale of Goods Act 1893. How far do these developments provide a model for reform of Malaysian law?

The final chapter takes a look at the implied conditions in Malaysia under the Sale of Goods Act 1957. This Act is modeled on the United Kingdom Act of 1893, and is

therefore archaic and obsolete. In this chapter some changes to the Malaysian Act are proposed.

## **CHAPTER ONE**

### **INTRODUCTION TO THE CONTRACT OF SALE OF GOODS**

#### **INTRODUCTION**

This chapter takes a look at the historical origin of the contract of sale and the development of the implied warranties. The aim and objective of this chapter is to trace the influence that helped to shape up the common law of implied warranties. The historical survey shows that the influence was the Roman law, mediated through the law merchant to become part of the English law. This chapter will briefly discuss the history of the Roman law of sale, which is a species of consensual contract, and how it was received in Europe and in England via the law merchant. The relationship between the law merchant and the common law itself had helped in the development of the English law of implied warranties which was later codified into the Sale of Goods 1893.

#### **(I) MEANING**

In Roman law, sale is basically an exchange of something for money, leading to a transfer of ownership of the thing from the seller to the buyer. It is a contract whereby one person transfers or agrees to transfer to another a thing and to procure for him the undisturbed and permanent possession of it, and the other, on his part, promises to pay the price.<sup>1</sup> According to Sohm<sup>2</sup> sale is a contract whereby one party, the vendor, binds

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<sup>1</sup> Lee, R.W., *The Elements of Roman Law*, p. 308.

<sup>2</sup> Sohm's *Institutes of Roman Law*, translated by J. C. Ledlie, p.379.

himself to make over a thing; the other, the purchaser, binds himself to pay a sum of money called the price. No formalities are needed in sale. The contract is valid the moment the parties agreed as to the thing to be sold and the price to be paid. It requires neither form nor one-sided performance. The agreement can either be oral or written. Usually it is put in writing or made before witnesses so that there would be evidence of its existence.

### **(i) ELEMENTS OF A SALE**

The essential elements of a sale are:-

- (i) consent or agreement;
- (ii) the thing or subject-matter; and
- (iii) price.

### **(i) Consent or Agreement**

Consent or agreement is the first key element in a contract of sale. Its absence or defect is fatal to the existence or validity of the contract. Consent can be negated by mistake or error. There are maxims in Roman law which provide that, “the will of the one who is mistaken has no force” and “persons who are in error cannot be considered as consenting”.<sup>3</sup>

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<sup>3</sup> Mackintosh, *Some Aspects of Roman Law*, p. 59.

## **(ii) Subject-matter or Thing**

The next essential element in a contract is the subject-matter or thing. It must be in existence or capable of existing. There is a universal rule that an agreement to sell a specific thing which at the time of the agreement had ceased to exist is a void contract.<sup>4</sup> The seller, under this circumstances, is unable to fulfill what he has promised. Thus, if a house has burnt down before it was sold, the contract is void. Secondly, the thing sold must be capable of being owned. Anything belonging to the public or public property cannot be the subject-matter of sale. Finally, the thing sold must be something in which the buyer acquires an interest under the contract. The buyer cannot buy something which is already his. Such sale is void because the seller has nothing to sell and the buyer has nothing to buy.

Anything corporeal or incorporeal can be the subject-matter of sale, such as a right to an inheritance, a thing belonging to the seller or to a third party, and a thing already in existence or which will come into existence. Future things could be sold, such as next year's harvest. Such a contract could take two forms: purchase of a hope or purchase of a hoped-for thing. As to the first, what is bought is a chance and for the sale's validity it does not matter that nothing materialises. In the second instance, the future thing itself is sold and the sale is void if the thing sold does not materialise.<sup>5</sup> The sale is taken to be subject to a condition.

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<sup>4</sup> Zulueta, **The Roman Law of Sale**, p. 12.

<sup>5</sup> Watson, **Roman Law and Comparative Law**, p. 28.

### **(iii) Price**

The third element in sale is price. Price must consist of money. It must be certain in that the contract must fix a definite price. The certainty of the price is important as an assurance that the bargain was the work of both parties and also to ensure that the contract would not break down due to lack of or an unascertainable price. Price can be fixed by a third person but if he fails to do so, the contract will fail.

## **(II) HISTORICAL ORIGIN OF THE CONTRACT OF SALE**

The contract for the sale of goods originated from the Roman law as one form of the consensual contract. The consensual contract is one of the most remarkable achievements of Roman jurisprudence. It is characterised by its consensuality, bilaterality and the necessity of good faith. By consensuality is meant that only the agreement of the parties is necessary for a valid contract. Writing is not needed nor is it necessary that something should be given for the obligation to come into being; it is enough that the persons dealing should consent. By bilaterality is meant that the obligations of the parties are reciprocal. This means to say that duties exist for both parties from the moment of the conclusion of the contract; the seller is bound to deliver the goods or the subject-matter and the buyer is bound to pay the price. Therefore, a plaintiff would not succeed in his claim unless he could show that he had performed or is ready and willing to perform his part of the contract. Liability of one party depends on the other having

discharged or being ready and willing to discharge his own liability. This characteristic of sale might however be modified and varied by the terms of the contract.<sup>6</sup>

The principle of good faith or bona fides required both parties not merely to do what they expressly undertook to do, but also to do all that was involved in a requirement of good faith<sup>7</sup>, in particular, to avoid fraud. Under Roman law buyers did not rely entirely on the implication of good faith, however. They often took express warranties or stipulations from the sellers, and these were usually in relation to quality, eviction and quiet possession. The express undertaking by the seller made him liable for whatever defects found in the goods. Soon the law began to imply these warranties and stipulations in every contract of sale and from this the law of implied warranty developed.<sup>8</sup>

The importance of good faith was two-fold: (1) to enforce the formless consensual contract; (2) to prevent fraud. If either of the parties refused to perform his part of the bargain, the law would regard it as against the ethical tenet that promises should be kept. Therefore, the requirement of good faith would ensure that a purely promissory contract would be performed and the expectations of the parties would be met. If the seller fraudulently claimed that his wares were of a certain quality when he knew that they were

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<sup>6</sup> Zulueta, **The Roman Law of Sale**, p.20.

<sup>7</sup> **Sohm's Institutes of Roman Law**, translated by J.C.Ledlie, p.379.

<sup>8</sup> Zulueta, *op. cit.*, p. 49.



not, he would be liable for what he had affirmed. Good faith required the seller to be truthful in his words and actions.

**(a) DUTIES AND OBLIGATIONS OF PARTIES**

**(i) Duties and Obligations of the Seller**

Under the Roman law of sale these were the duties imposed on the seller:-

- (1) To deliver the thing or subject-matter and to give vacant possession.
- (2) To take care of it until delivery.
- (3) To guarantee against eviction.
- (4) To guarantee against latent defects.

**(1) Duty to Deliver and Give Vacant Possession**

The seller was bound to take all necessary steps to deliver to the buyer whatever right he had in the thing sold, together with accessories. Things that could be physically delivered were delivered by giving actual physical possession to the buyer. Things which could not be delivered physically, for example land, were delivered through a formal process known as **mancipatio**. The seller was not bound to make the buyer owner immediately and directly. He need not give good title, but he must guarantee the buyer success in any possessory action.<sup>9</sup> He must warrant the buyer against eviction during the period necessary for **usucapio**, i.e a period defined by law whereby a person in possession of property could acquire legal title. This was also known as acquisitive prescription. The

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<sup>9</sup> Digest 19.1.11.13.



seller's duty was satisfied if, without contrary intention, he gave vacant possession to the buyer. This proposition may be split into two; firstly, he must put the buyer in physical possession (which he cannot do if somebody else is in possession). Secondly, he must give vacant possession, i.e. exclusive possession not defeasible by interdict and free from burdens interfering with it except such as had been agreed upon.<sup>10</sup>

### **(2) Duty to Take Care Until Delivery**

In Roman law ownership was not transferred until the thing was actually handed over, but the risk of the thing being destroyed or damaged was on the buyer from the moment the contract was made perfect, (i.e from the moment of the agreement). The seller who had possession of the thing sold was under a duty to make sure that the thing was safe while still in his control. His position was similar to a borrower of the thing. If the thing perished due to his fault or negligence he would be liable to pay damages to the buyer. The standard of his duty was to exercise reasonable diligence. If he was not at fault and loss was due to an event which could not have been prevented, then the buyer had to suffer the loss. He had to pay the price without getting anything in return.<sup>11</sup>

### **(3) Duty to Guarantee Against Eviction**

The seller was not under a duty to transfer good title to the buyer. He was only bound to do what would transfer ownership, and this was to give possession of the thing to the

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<sup>10</sup> Lee, *op. Cit.*, p. 312.

<sup>11</sup> Zimmermann, *Law of Obligations*, p.287.

buyer. The seller's chief liability was to supply the thing itself, that is, to deliver it.<sup>12</sup> If the seller was owner, delivery made the buyer owner in his turn; if he was not, it would make the seller liable for eviction only, provided that the price had been paid or security given for it.

Historically, Roman law imposed no contractual liability on the seller on account of eviction. Contractual liability first arose out of a voluntary verbal promise, a stipulation, given by the seller to the buyer which was actionable in its form.<sup>13</sup> The seller might either promise to pay a definite sum of money, usually double the price (*stipulatio duplae*), in the event of the buyer being evicted, or to pay unliquidated damages if the warranty for peaceable possession (*stipulatio habere licere*) was breached. In the course of time these stipulations came to be implied in every sale.

When the seller did not own or have title to the property which he delivered to the buyer, he could not make the latter owner of that property. The law provided that no one could give a better title than he himself possessed. This is the principle of *nemo quod non habet*. When the seller had no title, a third party, usually the true owner, could evict the buyer and sustain his claim over the property. But if the buyer had acquired a good title for himself before being evicted, his title would over-ride that of the true owner. The buyer could acquire a good title by *usucapio* or by lapse of time, provided that certain

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<sup>12</sup> Digest xxi. 2.

<sup>13</sup> Zulueta, *Sale*, p.42.

conditions were satisfied. These conditions were that he must have acted honestly, and that he must not have been evicted within the time necessary to acquire good title. It followed from this that the seller's guarantee against eviction lasted for the period of time necessary for the buyer to obtain a title of his own. If within the crucial period the buyer's possession was disturbed, he could not acquire a good title and he would be liable to be evicted by the true owner. Not only that, the buyer might be liable for theft or for receiving stolen property in cases of movables<sup>14</sup>. If and when the charge of theft or of receiving stolen property was brought against the buyer he could raise the defence that he was a bona fide buyer and had acted honestly. And by virtue of the warranty he could also bring in the seller, not merely as a witness but as a substitute in the proceedings<sup>15</sup>. The seller would then be under an obligation to defend the buyer by proving that he had had a good title to the property which he could pass to the buyer. If he failed to defend the buyer, and in that event the buyer was evicted, the latter had a cause of action against the seller.

The seller had to deliver the property into the buyer's possession but mere delivery was not enough. He did not fulfil his duty unless he put the buyer into such a position that he could maintain his possession against all comers.<sup>16</sup> If the buyer was evicted and the seller had not effectually defended the title the buyer had the following actions.

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<sup>14</sup> Powell, "Eviction in Roman Law and English Law", *Studies in Memory of Francis de Zulueta*, p. 80-81.

<sup>15</sup> *Id.* p.83.

<sup>16</sup> Mackintosh, *Some Aspects of Roman Law*, p.81.

First, there was the **actio auctoritatis**, whereby the seller was liable to pay double the price should the buyer be evicted by a third person within the period of **usucapio**.<sup>17</sup> This action was limited to sales of a certain class of property, i.e. those transferred by **mancipatio**.<sup>18</sup> A further requirement was that the buyer must give notice to the seller of the action to enable him to defend it.<sup>19</sup>

The second action was the **actio stipulationes**. Because of the limited application of the **actio auctoritatis** to property transferred by **mancipatio**, it became customary to stipulate in all contracts of sale a warranty against eviction. By a **stipulatio duplae** the seller usually promised to pay double the price in the event that the buyer should be evicted. This liability was incurred at the moment when the thing had been given up to the claimant, or when the buyer had been burdened in its assessed value or when judgement had gone in favour of a third party in possession in a suit brought by a buyer.<sup>20</sup>

#### **(4) Duty to Guarantee Against Latent Defects**

Initially under Roman law, the seller had no liability for hidden defects in the thing he sold. The buyer had to take it as it was. The attitude of the law was **caveat emptor** or,

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<sup>17</sup> Zulueta, *Sale*, p.43.

<sup>18</sup> Baldwin, "Warranty Against Eviction in the Civil Law: Extent of the Vendee's Recovery", *Tulane Law Review*, vol. 23, 1948-49, p. 140 at p. 141.

<sup>19</sup> *Ibid.*

<sup>20</sup> Digest 21.2.16.1.

let the buyer beware. Express warranty was not recognised unless given with a certain formality, in the form of a stipulation. The express stipulation was the first step to making the seller liable for defects which were latent. It was common to combine a stipulation against latent defects with a stipulation against eviction. The distinct verbal contract was an effective guarantee of the seller's liability. Later, the stipulation was made compulsory in every contract and it became a usual course to imply such undertaking.<sup>21</sup>

The other influence on the development of the law was the **aedilician edict**. The **aediles** were given a sort of police jurisdiction over the public markets and they issued an **edict** in the second century B.C that sellers of slaves and cattle had to declare certain faults, mainly physical defects, and gave action against them when the defects became apparent whether the sellers knew about them or not. The action against them was either for **actio redhibitoria** or **actio quanti minoris**.

The **actio redhibitoria** was an action given to the buyer to cancel the sale within six months from the time of the sale or from the time the defects were discovered.<sup>22</sup> It could be taken when:-

- (1) the seller failed to declare the diseases and defects referred to in the **edict**;  
or
- (2) the seller had given a stipulatory promise but was in breach of it; or

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<sup>21</sup> Zulueta, op. cit., p. 47.

<sup>22</sup> Digest 21.1.25.

- (3) the seller had been fraudulent.

The underlying principle of this action was to restore both parties as far as possible to the position in which they would have been had the contract never been made. In other words, this was a *restitutio in integrum*. When redhibition took place the buyer had to return the slave and make good to the seller any physical or non-physical deterioration of the slave caused by him.<sup>23</sup> The seller on the other hand had to return the purchase price paid by the buyer, with interest<sup>24</sup>; indemnify the buyer for any damage caused by the slave<sup>25</sup>; and reimburse the buyer for such cost and expenses as the seller would have incurred on the slave.<sup>26</sup>

An alternative to the **actio redhibitoria** was the **actio quanti minoris** which could be brought within twelve months of the sale. It was a claim whereby the buyer was allowed to keep the slave and obtain a reduction of the price proportionate to the defects that had become apparent. In some cases this cause of action was not worthwhile pursuing because the defect might be so considerable as to make the sale worthless.

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<sup>23</sup> Digest 21.1.23.

<sup>24</sup> Digest 21.1.25; Digest 21.1.29.

<sup>25</sup> Digest 21.1.23.8.

<sup>26</sup> Digest 21.1.27; Digest 21.1.29.3.



## **(ii) Duties and Obligations of the Buyer**

### **(1) To Pay the Price**

The buyer's duty towards the seller was to pay the price on time. If payment was delayed, he had to pay interest on the price as well as the seller's expenses. The duty of the buyer was subject to the seller's readiness and willingness to discharge his own duty. Thus, if the seller failed to deliver, the buyer might refuse to pay.

### **(2) Duty to Take Delivery**

The buyer was under a duty to take delivery as soon as the seller tendered it or at the time agreed. In the absence of other agreement, it was the buyer's duty to remove the goods, not the seller's to send them. Any cost properly incurred by the seller between the date of the contract and delivery was charged to the buyer.<sup>27</sup>

## **(III) RECEPTION OF ROMAN LAW IN EUROPE IN THE MIDDLE AGES**

The Roman law of consensual contract spread and was received in Europe through trade. The period between the eleventh and twelfth centuries witnessed a rapid increase in trade in countries like Italy, Spain, France and Germany. The presence of the seaport cities and international fairs in some other cities further accelerated this growth. These fairs were periodic markets which were held at regular intervals and among the most important of these cities were those of Italy. It was therefore not surprising that trade was much concentrated in Italy.

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<sup>27</sup> Digest 19.1.13.20.

The merchants formed their own organisations and associations which were mainly concerned with the welfare of their members and with the control of mercantile and maritime affairs. In Italy the merchants were amongst the most influential people in society and they enjoyed substantial self-government. They were able to develop their own set of laws which were made up of elaborate rules formulated by the merchants themselves to ensure proper conduct of trade. Then there were also treaties entered between the commercial organisations with foreign countries to secure protection, privilege and redress for their own members. There were also statutes and rules laid down by the commercial bodies in performing their juridical function. All these developed to form a body of law which was known as the law merchant. The ideas of the Italian law merchant began to spread to Europe through the international fairs. The Italian merchants present at these fairs familiarised merchants from other parts of Europe with their commercial ideas.

Through trade and through the evolution of the law merchant the Roman law of sale was spread and received in Europe. One might ask, how did law merchant help to spread Roman law? The law merchant originated in Italy which was the centre of legal and commercial life in Europe in the Middle Ages. Having its origin in Italy, the law merchant would possess a similar characteristic to the Roman law. The law merchant recognised as binding the Roman consensual contract of sale and hire which could be entered into by a simple unwitnessed agreement on the subject-matter and the price. This form of simple contract was convenient to the merchants. They could enter into a binding contract even though they were apart, and payment and delivery could be



postponed because consensual contract of sale is an executory contract not dependent upon immediate performance for enforceability. They could rest assured that their commercial expectations would be fulfilled. In furtherance of that, the Roman law, in particular the *jus gentium* and the edict of the aediles, had developed the implied warranty against eviction and latent defects which would guarantee the rights of the buyer.

#### **(a) LAW MERCHANT**

The law merchant is an obscure concept and no precise definition can be given to it. It was basically a law made by merchants for merchants because “no technical jurisprudence peculiar to any country would have been satisfactory to traders coming from many different countries.”<sup>28</sup>

The law merchant comprised rules to ensure the proper conduct of trade. It also included treaties, statutes and rules laid down by commercial bodies in performing their judicial functions. All these developed around Europe to form a body of law known as the law merchant. It is pertinent to consider this matter as it contributed a great deal to the development of the English law of sale. The most important contribution was the introduction of the consensual contract through the mercantile courts, which were the borough courts, the fair or the piepowder courts and the staple courts. Their main concern was to give protection to, and to enforce, the legitimate commercial expectations of the contracting parties. Most cases before these courts concerned contracts for the sale

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<sup>28</sup> Holdsworth, *History of English Law*, vol. (1) p. 543.

of goods, with the specific problems of quality of the goods, goods which did not conform to sample, and defective title. If a buyer was faced with any of these problems, damages could only be claimed if there was fraud on the part of the seller or the seller had given an express warranty to that effect. No special form of words was necessary to constitute warranty, but in the absence of such warranty, the seller could not be held liable.<sup>29</sup>

The procedure observed in these mercantile courts was not subject to the same procedure and technicalities at the common law courts. Since speed was the essence, procedure was summary in nature. One of the first demands of the merchants was for a court with jurisdiction to deal with their disputes swiftly so that they could carry on with their real and ever-pressing business.<sup>30</sup>

#### **(IV) SALE OF GOODS IN ENGLAND**

In the middle ages, while Roman law and the law merchant had long enforced consensual contracts, the English common law was still insisting that the contract be wholly or partly executed, i.e. the price paid or delivery made, before it could be enforced. If the price had been paid but delivery was withheld, the buyer could sue the seller in *detinue*, i.e. for the delivery of the goods. If, however, delivery had been made to the buyer but payment

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<sup>29</sup> Borough Customs, Sel. Soc., ii, p. 153.

<sup>30</sup> Cornish, W.R. and Clark, G. de N., *Law and Society in England: 1750-1950*, p 197.

of the price was withheld, the seller could sue the buyer for debt. But in both these actions there had to be proof of a quid pro quo or benefit conferred upon the party before he could be liable for price or delivery. This rule followed the rigid concepts of property law which dominated English thinking about sale. Thus, in a sale of goods, property or ownership must have passed to the buyer before he could be made to pay the price and for him to demand delivery of it. As such, the contract of sale of goods was perceived in England as a conveyance of property rather than as a contractual imposition of future obligations.<sup>31</sup> This was a fundamental difference from the Roman law.

However, well before the middle of the fourteenth century the common law recognised the binding quality of executory contracts for sale of goods as long as earnest money had been given and received.<sup>32</sup> By the fifteenth century a simple agreement in itself was generative of liability. In the absence of anything to the contrary, the buyer immediately became the owner of the goods and could bring his action of detinue for them even if he had not paid any part of the price, while the seller could sue for the price without delivering the goods to the buyer.<sup>33</sup> The common law was on the road to recognising the consensual contract of sale.

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<sup>31</sup> Ibbetson, "From Property to Contract: Transformation of Sale in the Middle Ages", **Journal of Legal History**, vol. 13, 1992, p. 1-22.

<sup>32</sup> Ibbetson, "Sale of Goods in the Fourteenth Century" **Law Quarterly Review**, 1991, p.490.

<sup>33</sup> *id.* p.490.

### (a) THE DOCTRINE OF CAVEAT EMPTOR

Caveat emptor simply means “let the buyer beware”. It is a fundamental principle of English law. The maxim requires that before agreeing to buy a thing buyers must check its defects for themselves or, if that was not enough, protect themselves by taking express warranties from the seller.<sup>34</sup> This maxim emerged at a time when sale of goods took place in the open market where buyers had the opportunity to examine them. This explains why the maxim is concerned only with goods which are specific, i.e, identified at the time of sale, and a buyer of such goods must take them as they are. He has got to make himself aware of whatever defects the goods may have, apparent or latent. In the case of the latter, the buyer could insist upon a warranty from the seller as a safeguard.

The medieval judges adhered strictly to the maxim of caveat emptor, and this probably discouraged many litigants from going to court. Even if they did bring their case to court, they had to prove that there was fraud on the part of the seller, or that he had given an express warranty in a proper form of declaration, i.e. **warrantizando vendidit**, otherwise the action would not lie. Strict adherence to the maxim left the law without an adequate means of repressing fraud. The law burdened buyers with preventing themselves from being cheated by cunning sellers. The buyer had the opportunity of examining the goods before him; therefore his eyes and his taste ought to be his judges.<sup>35</sup> The courts regarded it as a matter between the parties themselves and they were not interested in the fairness of the exchange.

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<sup>34</sup> de Zulueta, *Sale*, p.47-48.

<sup>35</sup> Holdsworth, *op. cit.*, vol. viii, p.69.

*Chandelor v. Lopus* (1603)<sup>36</sup> could be regarded as the classic authority for the doctrine of caveat emptor, and was a famous landmark in the law of deceit and implied warranty. In this case Lopus brought action on the case in the King's Bench against Chandelor, who sold him a stone and asserted it to be a "bezar stone", a rarity which was believed to have medical properties. Lopus complained that the stone was not "bezar stone" and that Chandelor, as a jeweller who had skill in jewels and stones, affirmed it to be "bezar stone". Lopus obtained judgement but was reversed in the Exchequer Chamber on the ground that mere assertion or affirmation was not a warranty and therefore not actionable. Lopus brought another action in the King's Bench, this time alleging that Chandelor knew that the stone was not "bezar stone". His counsel argued that it would be deceit if the seller affirmed more than was true of his wares even though he did not warrant them. Counsel for Chandelor contended that deceit would lie if he knew that the stone was not "bezar stone", but if he was ignorant of this, no action would lie. It was held by Popham J. that it could be dangerous and might cause a multitude of actions if it was thought that a bare affirmation of the seller would give rise to a cause of action. But he went on to say that this was not necessarily so, because there must be knowledge in the seller that the buyer would not get the effect of the bargain. In this case, the principal matter was that Chandelor, knowing that the stone was false, sold it to Lopus as a "bezar stone" in the knowledge that Lopus could not have the profit. The cause of action was

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<sup>36</sup> Cro. Jac. 4 79 Eng. Rep. 3 1603.

the knowledge that the stone was not a “bezar stone” and the selling was with intent to deceive. Judgment was recorded for the buyer.

When there was no warranty, liability could only be imposed upon a seller if he had been fraudulent. The action would be one of deceit, which gave a remedy to the buyer who suffered losses due to the fraud and misrepresentation of the seller. Deceit in the king’s court had to affect the royal interest, otherwise the court had no jurisdiction in the matter. Common deceit thus went to the local jurisdiction, which provided that cheating which induced others into actions detrimental to themselves was a wrong and criminal. Local courts placed much attention on public interest especially in honest dealing.<sup>37</sup> But to support his claim, the buyer had to prove that the seller knowingly misrepresented the facts or that he falsely promised a fact which he knew was not true. The allegation would be not only that the defendant falsely made the representation but that it was made knowingly.<sup>38</sup>

Even though express warranty and/or knowledge were important, in cases of sale of food these requirements were dispensed with. Liability was imposed despite the fact that the seller had neither given undertaking nor been fraudulent. Milsom quotes Frowyk J. in a 1507 case putting forward this proposition: for food, the seller would be liable, warranty or no warranty, and apparently knowledge or no knowledge; for other things he

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<sup>37</sup> Milsom, **Historical Foundation of the Common Law**, p. 362.

<sup>38</sup> Potter, **Historical Introduction to English Law**, 1932, p. 380.



would be liable without warranty only if he knew.<sup>39</sup> The ground for allowing an action in tort for such cases was that of public policy. It was in the interest of the community at large that sellers of food or retailers should be honest in doing their job. They could be sued in tort if failed to measure up to the standard required by the law<sup>40</sup>. It would seem that consumer protection was already in existence in the middle ages in respect of foodstuff.

## **(b) LAW OF WARRANTY IN ENGLAND**

The law of warranty is the cornerstone of the study of the law of sales. It has been said that without a grasp of the law of warranty, the central aspects of the law of sale of goods cannot be really mastered.<sup>41</sup> Through it one can also come to understand the other inter-related concepts of caveat emptor, representation and condition. However, the history and development of the law of warranty has been in utter confusion because the term has been used in various ways and given various meanings. It is therefore not surprising that Lord Coke once remarked that “the learning of warranties is one of the most curious and cunning learnings of the law”.<sup>42</sup>

Warranty is originally a word used in the vocabulary of real property, i.e. land. Ordinarily, warranty in land was an obligation which was owed by the lord to the tenant

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<sup>39</sup> Milsom, “Sale of Goods in the Fifteenth Century”, *Law Quarterly Review*, vol. 77, p. 279.

<sup>40</sup> Holdsworth, H.E.L., vol. iii, p. 386.

<sup>41</sup> Baker, *An Introduction to English Legal History*, 3<sup>rd</sup> ed. p. 293.

<sup>42</sup> Quoted in Burdick, “Conditions and Warranties in Sale of Goods”, *Columbia Law Review*, 1901, p.71, at p. 78.

of a certain piece of land. This obligation was to defend the tenant in the possessions of the land against all men. This obligation to warrant was primarily an obligation upon the lord to go to court, if called upon by the tenant, in order to defend some action brought against him for possession of that land.<sup>43</sup>

In the context of sale of goods, warranty covers almost the whole area and scope of the seller's duties towards his buyer in respect of the goods sold. The literal meaning of the word is an "undertaking" or promise on the part of the seller as to the condition of the subject-matter of the sale. It is common for the parties to the contract of sale to undertake a process of negotiation before concluding the sale. During this process, the seller usually promises or undertakes that certain facts are true with regard to the subject-matter of the sale. Such undertaking or promise, if not a mere statement of opinion, will have a binding effect upon the seller, even though it may be implied.

Under section 61 of the Sale of Goods Act 1979, warranty is defined as "an agreement with reference to goods which are the subject of the contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim of damages but not a right to reject the goods and treat the contract as repudiated." There are two aspects of this definition that require further discussion. Firstly, it says that a warranty is an "agreement" and it also says that a representation can be a warranty if

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<sup>43</sup> Bailey, "Warranties of land in the Thirteenth Century", *Cambridge Law Journal*, 1944, p. 274.



intended and incorporated into the contract as a term.<sup>44</sup> So, a warranty can either be a representation or an agreement. Stoljar comments that if a warranty is defined as an agreement, how can a representation amount to a warranty as well? These are two different concepts: an agreement is contractual while a representation is tortious.<sup>45</sup>

The dual character of warranty can be better understood when we look into its history. Warranty began initially as a tort action which later turned into contract with the development of *assumpsit*. When it was the tort of deceit, it was only necessary to prove that the representation was false. There was no need to show that the warranty was part of the contract.<sup>46</sup> The basis for the claim was that the buyer had been deceived by the statement of the seller. But when the warranty concept was received into contract, there were some difficulties in determining when a representation is a warranty and, if it is a warranty, what its status is. Since it is made prior to the contract, is it collateral to the main contract or is it part of it?

As to when a representation is a warranty, reference has to be made to what was said by Buller J. in the case of *Pasley v. Freeman* (1789).<sup>47</sup> He said that, “..... an affirmation at the time of a sale is a warranty provided that it appears on evidence to have

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<sup>44</sup> Chalmers Sale of Goods, 18<sup>th</sup> ed. P. 5-6.

<sup>45</sup> Stoljar, “Condition, Warranties and Description of Quality in Sale of Goods”, **Modern Law Review**, 1952, p.425.

<sup>46</sup> Greig, “Misrepresentation in Sale of Goods”, **Law Quarterly Review**, 1971, p. 179.

<sup>47</sup> (1789) 3 T.R. 51.

been so intended.” The word “intention” can either mean intention to make the representation a warranty or intention to contract. In *Hopkins v. Tanqueray* (1854)<sup>48</sup> there was a sale of a horse by auction where a representation, that the horse “was perfectly sound”, was made by the seller on the day prior to the sale. The buyer was dissuaded from his examination of the horse. Upon the purchase of the horse it was found to be unsound. The buyer relied on the representation to claim damages. The court gave judgment in favour of the defendant. Crowder J. said that to constitute a warranty, a representation must be shown to have been intended to form part of the contract.<sup>49</sup> Jervis C.J. held that what was said was a representation only and not a warranty.<sup>50</sup> Maule J. expressed the same view, that what was said was an honest representation of his opinion<sup>51</sup>. In this case “intention” means intention as to whether the statement is a warranty or a mere representation. The intention refers to the representation; it must be intended as a warranty and not as a statement of opinion.

In the case of *Heilbut v. Buckleton* (1913)<sup>52</sup> the plaintiff inquired from the defendant, a manager of a company, whether it was setting up a rubber company and also whether it was safe to invest in it. Upon the defendant’s reply the plaintiff was induced into buying shares in the company. The company proved to be a failure, which resulted

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<sup>48</sup> (1854) 15 C.B. 130.

<sup>49</sup> *id.* p. 141.

<sup>50</sup> *id.* p. 138.

<sup>51</sup> *id.* p. 140.

<sup>52</sup> [1913] A.C. 30.

in the plaintiff suffering a great loss. In the lower court, judgment was entered for the plaintiff but on appeal to the House of Lords the decision was reversed. The court held that there was no issue at all of a warranty and therefore it should not have been submitted to the jury. The court understood intention to mean intention to contract and there was no evidence to show that the words used were words of contract.

Mackenzie Chalmers, the draftsman of the Sale of Goods Act 1893, noted that “intention” meant intention to contract. According to him, a representation may or may not be incorporated into the contract and whether or not it does so will depend upon the intention of the parties. If it is made in the course of negotiations for the purpose of inducing the other party to enter into the contract and it actually induces him to contract, it is *prima facie* a term of the contract.<sup>53</sup>

There is no question of contrasting it with a purely collateral contract. Once it is accepted as a warranty, the next question that needs to be answered is, what is its status? Is it collateral to the main contract or is it part of it? This is the second aspect of the definition of warranty, where it is given as collateral to the main contract. In the early law of sales, by virtue of *caveat emptor*, the buyer could only protect himself against the purchase of a latently defective item by insisting on an express warranty about the quality of the goods. This warranty, which gave rise to a tort action, was collateral in nature. From this a misconception arose that there were two separate contracts; one was the sale

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<sup>53</sup> Chalmers, p.5.

and the other was the express warranty. But if the warranty is intended to form part of the main contract, then it should be considered so.

The word warranty is also used to mean a term of lesser importance compared to a condition. In section 53 of the Sale of Goods Act 1979, derived from s.53 of the Sale of Goods Act 1893, breach of a warranty entitles the buyer to sue for damages, but breach of a condition gives rise to a repudiation of the contract.<sup>54</sup> The term “condition” is another source of problems because there are many meanings to it. A condition can be a quality or character of a thing or a person; for example, the condition of the car is defective, or a person is in good condition. Condition can also refer to some fact or event without which a thing cannot be. The event can be one upon which the obligation of one or both parties depend upon or upon which the existence of the contract depends. If that is the case, then the event or the contingency upon the happening of which the duty of performance depends is called a “condition”. Therefore, “condition” describes the particular fact or event in the contract which controls the existence of the duty of performance as well as the existence of its breach.<sup>55</sup> Such a condition is a condition precedent.

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<sup>54</sup> “Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty.”

<sup>55</sup> Stoljar, “The Contractual Concept of Condition”, **Law Quarterly Review**, 1953, vol. 69, p. 494.

## **(c) DEVELOPMENT OF IMPLIED WARRANTIES**

### **(i) Implied Warranty of Title**

During the period between the sixteenth and the nineteenth centuries, the trend of the courts was to develop the doctrine of implied warranties. The first warranty was the implied warranty of title. Title is the most important factor in every contract of sale and from the sixteenth century onwards, most cases involved the issue of title. In *Dale's Case* (1585)<sup>56</sup> the plaintiff brought an action against the defendant for selling him items which belonged to another. Two out of three judges held that an action would not lie because there was no fraud, nor was there any express warranty. The third judge (Anderson J.) was, however, willing to adopt the doctrine of implied warranty because a mere sale of goods necessarily involved a warranty.

The approach of Anderson J. was accepted by Holt C.J., who held in the case of *Cross v. Gardner* (1689)<sup>57</sup> that an affirmation of title in the seller, though made without knowledge of falsity, and not put in special form and words, was ground for liability. In this case the plaintiff alleged that the defendant had sold two oxen in his possession, and had falsely affirmed them to be his own when they actually belonged to another man. It was held that the affirmation by the seller gave rise to a good cause of action even though there was no fraud and that bare affirmation amounted to a warranty. This same

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<sup>56</sup> *Dale's Case* Cro. Eliz. 44.

<sup>57</sup> (1689) Carth 90.

approach was taken in a later case of *Medina v. Stoughton* (1700).<sup>58</sup> In this case the defendant was in possession of two lottery tickets which he sold to the plaintiff, affirming them to be his. Holt C.J. said,

“When one having the possession of property sells it, affirming it to be his amounts to a warranty, and an action lies on the affirmation, and perhaps no other title can be made out; aliter where the seller is out of possession, for there may be room to question the seller’s title, and caveat emptor in such case to have either an express warranty or a good title.”<sup>59</sup>

It can be said from these two cases that in order for the court to imply a warranty of title, the seller had to be in possession of the goods because possession is the colour of title. If the seller was not in possession, there had to be an express warranty for a successful suit. In *Ormrod v. Huth* (1845)<sup>60</sup> the court held that the buyer must prove that there was a representation of title which was known to be false by the seller or the affirmation was embodied in the contract. In *Morley v. Attenborough* (1849)<sup>61</sup> the seller, who was a pawnbroker, sold a harp which was pledged to him. Unknown to him, the pledgor had no title to it. The court held that there must be an express warranty of title or, if there was none, there must be something in the transaction to indicate that an

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<sup>58</sup> 1 Salk 210.

<sup>59</sup> Quoted from E. McClain, “Implied Warranties in Sales”, *Harvard Law Review*, 1893, p. 28.

<sup>60</sup> (1845) 14 M & W 651.

<sup>61</sup> (1849) 3 Exch. 299.



affirmation was equivalent to an express warranty. But Parke B. opined that there was always an implied warranty that the seller had the right to dispose of the subject he sold. The seller must be considered to warrant that those who bought the goods from him would have a good title to keep them.

There are two other related obligations of the seller in connection with the implied warranty of title. These are of quiet possession and freedom from encumbrances. Once it is established that the seller is the rightful owner of the goods and that he has a rightful title to it, he can pass the same to his buyer. There will be no third person to interfere with the goods, and thus the buyer can enjoy quiet possession of them.

#### **(ii) Implied Warranty of Quality**

The principle of implied warranty of quality was laid down by Lord Ellenborough in the case of *Gardiner v. Gray* (1815).<sup>62</sup> In this case the buyer bought twelve bags of “waste silk” imported from the continent. Neither the buyer nor the seller had seen the goods, but samples had been sent and shown to the buyer by the agent of the seller. The goods were found to be unmerchantable. Lord Ellenborough held that a buyer had a right to expect a saleable article answering the description in the contract. If there was no particular warranty, this would be implied into the contract because without warranty, the buyer could not insist that it should be of any particular quality or fitness. But the intention of the parties must be clear that the goods should be saleable in the market under the denomination mentioned in the contract between them. He went to say that if

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<sup>62</sup> (1815) 4 Camp. 144.



there was no opportunity to inspect the commodity, the maxim of caveat emptor did not apply. According to him, “the purchaser could not be supposed to buy goods to lay them on a dunghill.”<sup>63</sup> The issue in this case was whether the commodity bought by the plaintiff was of such quality as could be reasonably brought into the market to be sold as waste silk. If it could not be sold as waste silk, then the goods were not of merchantable quality.

A similar approach was taken in the case of *Jones v. Bright* (1829),<sup>64</sup> where the buyer bought copper from the manufacturer for the particular purpose of sheathing a ship. The copper was defective and lasted for only four months instead of the normal period of four years. Best C.J. observed that if a man sells generally, he undertakes that the article is fit for some purpose; if he sells for a particular purpose, he undertakes that it shall be fit for a particular purpose. The first limb of his judgment refers to the general merchantability of the goods. If the goods are ordinarily described or named, they must answer to that description or name. Further, they must also be saleable in the market under the description or name, meaning that they must be reasonably fit for their ordinary uses to which such goods were put.<sup>65</sup> The second limb of his judgment refers to the implied warranty for the particular purpose required by the buyer. This is a separate and distinct obligation from that of merchantable quality, but it sometimes overlaps.

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<sup>63</sup> Id. p. 14.

<sup>64</sup> (1829) 5 Bing. 533.

<sup>65</sup> Prosser, “The Importance of Warranty of Merchantable Quality”, *Canadian Bar Review*, 1943, vol. 21, p. 450.

The doctrine of implied warranty of merchantable quality became applicable, not in all cases, but only where the goods involved were unascertained. A distinction was made between sale of specific goods, i.e. goods which are in existence at the time of the sale and which could be inspected, and sale of unascertained goods, i.e. goods which are not in existence, or which, though in existence, are not identified as the subject-matter of the contract of sale. In the sale of specific goods there would be no implied warranty even with regard to defects which might be latent, because there was an opportunity for inspection available to the buyer. In the sale of unascertained goods the court was more willing to imply merchantable quality if the goods were manufactured or supplied for a particular purpose make known by the buyer to the seller; or if the goods were sold under a particular description.<sup>66</sup>

Thus, under the common law, the maxim of *caveat emptor* did not apply to a sale of goods where the buyer had no opportunity of inspection because the goods were unascertained or not present at the time the contract of sale was entered into. In such a case, the goods were described by reference to a certain class possessing certain characteristics, so that they could be easily identified as being the subject-matter of the contract. This form of sale began to flourish in the nineteenth century as a result of the industrial revolution, which caused considerable expansion in the numbers and complexity of goods offered for sale. There was also a rapid growth of international trading because communication was made easier and contracting at a distance became possible. Sometimes goods were bought before they were even made available.

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<sup>66</sup> E. McClain, *op cit.* p. 218.

In the case of *Jones v. Just* (1868)<sup>67</sup>, the plaintiff bought a quantity of Manila hemp from the defendant which was to arrive from Singapore by a certain ship. On arrival, and after delivery to the plaintiff, the bales were found to have been wetted through with salt water, unpacked afterwards and dried and then repacked and shipped at Singapore. The damage was not so extensive as to make the goods lose the character of hemp, but they were not “merchantable”. The plaintiff sold the hemp by auction as “Manila hemp with all faults” and realised 75% of the price which similar hemp, undamaged, would have fetched. The court held that there was an implied warranty to supply Manila hemp which was of merchantable quality. Where the manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the buyer had the opportunity of inspecting, it is an implied term in the contract that he shall supply merchantable goods.

The principle which was established in the above case is that, under a contract to supply goods of a specific description, where the buyer has no opportunity to inspect, the goods must not only answer the specific description, but must be saleable or merchantable under that description. This is because it must be assumed that the buyer and seller contemplated dealing in an article which was merchantable. The buyer bought with the purpose of resale, and if the goods were unmerchantable, it would not be easy for him to find a customer for his goods. The buyer who had not seen the goods cannot

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<sup>67</sup> (1886) L.R 197.

exercise his own judgment; therefore he trusted the judgment, knowledge and information of the seller.

### **(iii) Implied Warranty of Description**

The new doctrine of implied warranty of merchantable quality was closely associated with the equally newly developed theory of description. Description developed to a special form of sale, i.e. sale by description. As mentioned earlier, the nineteenth century witnessed the rapid growth of trade; business people bought goods before they were even produced. Goods were usually bought by buyers enumerating the qualities they required them to possess. Buyers began to rely more and more on the seller's skill and judgment; so much so that it was felt necessary that the law should intervene to provide some protection to buyers, especially to those who had no opportunity to inspect and exercise their own judgment. As a solution, the law came up with the notion of sale by description.

The basic idea of the law was to impose upon the seller a duty to deliver to the buyer the goods which were contracted for and goods which were priceworthy. This duty had been legally and morally recognised by the courts in the early nineteenth century; and was made strict if sale was by description.<sup>68</sup> Sale by description was distinct from sale of specific goods because the former applied only to goods which were unascertained (although later development also included specific goods in sale by description for as

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<sup>68</sup> Stoljar, *op. cit.*, p. 432.

long as they were sold relying on the description). It was implied in such sales that the goods tendered were conform to their description and were worth the price they were paid for. If the term was breached, the buyer could reject the goods and treat the contract as repudiated, even if property had passed to him.

In *Barr v. Gibson* (1838)<sup>69</sup> a ship stranded in the Gulf of St. Lawrence was taken ashore and became a mere wreck. The value of the ship dropped from £4,200 to £10. The ship was sold to the buyer in London. There was no proof that the seller knew of the mishap. The issues before the court were whether the ship was still a ship and whether the warranty of quality would be implied by the law since the seller had neither promised nor affirmed merchantability, i.e. the sea-worthiness of the ship. The court admitted that the vessel was not a ship for the purposes of the law of insurance and probably was not a ship for the purpose of sailing. But as a subject-matter of a contract of sale, it had not ceased to answer to the description and still bore the character of a ship though damaged, unseaworthy and incapable of being beneficially employed. And being specific and ascertained, no implications of quality could be made. Parke B. said:

“In the bargain and sale of an existing chattel, by which property passes, the law does not, in the absence of fraud, imply any warranty of the good quality or condition of the chattel sold. The simple bargain and sale, therefore, of the ship does not imply any contract that it is then seaworthy, or in a serviceable condition ..... But the

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<sup>69</sup> (1838) 3 M & W 390.



bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description.”<sup>70</sup>

When it is said that goods are sold by their description, it means that the identification of the goods, which are the subject-matter of the sale, is by the description of their character. The description is also meant to define the goods which the seller is to deliver and which the buyer is to accept.

#### **(iv) Implied Warranty of Fitness**

Another principle closely related to sale by description and merchantable quality was fitness. It was another aspect of the duty of the seller with regard to the quality of the goods. Quality was initially implied into sales by description, where the buyer could not inspect the goods and was therefore not able to assess and judge the fitness of the goods. For that very reason, it was thought that the buyer would necessarily have to rely on the judgment and skill of the seller who was the manufacturer or dealer. There were two levels at which reliance on the seller’s skill and judgment could be made. In *Jones v. Bright* (1829)<sup>71</sup> Best C.J. held that, where goods were sold generally, the seller undertook that the article was fit for some purpose; if he sold for a particular purpose, he undertook that it should be fit for that purpose. The former, which demanded a minimum standard of quality, refers to merchantability of goods and the latter refers to fitness for a particular purpose required by the buyer, which he had made known to the seller.

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<sup>70</sup> Id. p. 399-400.

<sup>71</sup> Best C.J in *Jones v. Bright* (1829) 130 E.R. 1167.

As mentioned earlier, merchantability was implied only when the goods were sold by description, but when the goods were specific, caveat emptor applied and there was no term implied as to the general fitness of the goods. However, the implied warranty of fitness for particular purpose would still be implied for the purpose of providing protection to a buyer for such goods. The law provided that where the buyer made known to the seller the particular purpose for which the goods were required, so as to show that he relied on the seller's skill and judgment, there was a warranty that they were reasonably fit for that purpose. Mellor J. in *Jones v. Bright* (1868)<sup>72</sup> said that where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. But where the manufacturer or dealer undertakes to supply goods which the buyer has not had the opportunity of inspecting, it is an implied term that he shall supply a merchantable item.

The implied warranties in the contract of sale developed to provide a series of graduated protections to the buyer. In the first place, if the goods were sold by description they must correspond with their description. Secondly, besides correspondence with their description, the goods must also be of merchantable quality or fit for their usual purpose or purposes. Finally, where goods were bought for a particular

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<sup>72</sup> (1868) L.R. 3 Q.B. 197.



purpose, and this purpose was made known to the seller, the seller was under a duty to deliver goods which were fit for that particular purpose.

## **CHAPTER TWO**

### **CODIFICATION OF THE LAW OF SALE AND DEVELOPMENT OF THE IMPLIED TERMS**

#### **INTRODUCTION**

Chapter three is divided into three parts. Part (I) is on the pre-1893 law of sale in Scotland. This includes a discussion of the Mercantile Law (Amendment) Act 1856 where the English common law rule of **caveat emptor** was for the first time introduced into Scotland. Part (II) contains a discussion on the Sale of Goods Act 1893. This includes the process of its formation and its effects on the law of both countries. Part (III) consists of the development of the implied warranties. They have undergone various changes and amendments since the Sale of Goods Act 1893 until the passing of the Sale and Supply of Goods Act 1994.

#### **(I) PRE-1893 SCOTS LAW**

The common law of Scotland pertaining to the law of sale, followed that of the Roman law closely, and as such was different from that of England. According to the eighteenth century writer Erskine, 3,3,2,

"sale is a contract whereby one of the parties becomes bound to deliver  
a certain subject or commodity to another, with a view of transferring

the property, in consideration of a determinate price in current money to be paid for it. Though this contract is perfected by consent alone, it does not strike against the rule of law that the property of things cannot be transferred by tradition; for although the contract is entered into and perfected with a view of transferring the property to the buyer, it is not actually transferred, but remains with the seller or vendor till delivery of the subject. The seller in Scotland thus remains undivested of the property of the goods sold until they have delivered actually or constructively. When the contract of sale is completed by the consent of the parties, reciprocal personal rights and obligations are created; the seller becomes bound to deliver the thing sold as and when it has been agreed, and the buyer becomes bound to receive the goods, and pay the price."

Accordingly, a contract of sale of goods was binding on the parties, although entered into only by verbal agreement. A contract of sale was completed when the parties had agreed that the subject-matter should be delivered by the seller to the buyer upon consideration of the price. The three essentials of a valid contract of sale were consent, price and subject-matter. There was no necessity for a written agreement. And if the parties embodied their bargain in writing or did any external act to indicate the completion of the agreement, such thing was not essential to its constitution. The parties to the

contract of sale were bound and could not simply withdraw from the bargain just because it was in writing. This rule contributed to commercial convenience. With regard to transfer of property, the law of Scotland was that of the civil law. Until delivery the seller remained the owner of the subject sold and there can be no property acquired by the buyer without possession. All that he had was a personal right to demand fulfilment of the seller's personal obligation, i.e. the obligation to deliver upon payment of the price.

The common law of Scotland was basically influenced by the Roman law. Its law on the sale of goods proceeded on the principle of implied warrandice. The seller of goods was under obligation to warrant good title to the buyer and also to warrant that the goods sold were free from latent defects as to render it unfit for use for which it was normally intended. The concept of warrandice was very wide compared with warranty. It included an undertaking by a party, expressed as a term of the contract, guaranteeing some facts relating to the goods and to get back his price if paid.<sup>1</sup> This was the remedy of rejection granted to the buyer. M.P. Brown described warrandice in Scotland as meaning, "a sound price implied or sound article, irrespective of the buyer's object in buying, or the knowledge of the parties regarding the conditions of the goods."<sup>2</sup>

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<sup>1</sup> Gow, "Warrandice in Sale of Goods", **Juridical Review**, 1963, p. 31, at p. 33.

<sup>2</sup> Quoted in E.Sutherland, "Remedying an Evil?" Warrandice of Quality at Common Law in Scotland", **Juridical Review**, 1987, p. 25.

There were two aspects of the seller's obligations on entering into a contract of sale:-

- (1) the goods shall be fit and serviceable for their generic purposes.
- (2) they shall be of a quality commensurate with the price.

The application of the implied warranty is subject to certain factors and price is one of them. By looking at the price paid for the goods, one can imply the quality of it. For example, if a high price had been paid for a particular item, it was implied that it should be of the best quality. And vice versa, if the price was low, it was reasonable to expect that the quality would be lower. From this hypothesis, it was implied that the seller would be under an obligation to supply goods, the quality of which was commensurate with the price. In furtherance of this, it followed that priceworthy goods should be suitable for any purpose for which the goods were normally used and were saleable as such. This was referred to as the merchantability of the goods.<sup>3</sup>

Sale in Scots law is a consensual contract and a bargain *bonae fidei*, like that of the civil law. It is required that there should be an honourable dealing between the parties, especially on the part of the seller.<sup>4</sup> The requirement of *bona fides* was made the basis of the priceworthy principle. The seller was expected to disclose any defects within his knowledge. Any wilful concealment would amount to fraud. However, the seller was not

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<sup>3</sup> Gow, *op. cit.*, p. 36.

<sup>4</sup> Gow, *id.* p. 31.

obliged to draw the buyer's attention to defects which were visible and easily noticeable upon inspection. By that inspection or examination the buyer was barred from denying the contract in case there were latent defects. The application of the price-worthiness condition can be seen in these cases. In *Hill v. Pringle* (1827)<sup>5</sup> the buyer bought a quantity of rye grass from the seller. At the time of the sale, the buyer noticed that the seed had a musty smell and a bad colour. However, he did not say anything about this. When the seed failed to grow he made a claim against the seller for repetition of the price and damages. He was successful in his action and it was held that his failure to act on the warning signs did not bar him from his claim. According to Lord Pitmilley, even where the buyer had made such an inspection he was still entitled to rely on the seller supplying him with a price-worthy goods. He was not barred merely because he might have a suspicion or doubt about the satisfactoriness of the goods.

The Scots common law did not only imply quality in a sale but also fitness. By quality it meant that the goods must commensurate with the price, or in other words that the goods must be merchantable. By fitness it meant that the goods must be fit for the purpose/s to which they were commonly put. A seller therefore did not perform his contract unless he supplied a commodity "fit and serviceable" for the uses for which it was commonly put.<sup>6</sup> This duty was recognised in any kind of sale, irrespective of whether the seller was a dealer or not. When the buyer stated a particular use to which the goods were

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<sup>5</sup> (1827) 6 S 229.

<sup>6</sup> Hume II 40, Quoted in Gow, op. cit., p. 47.



to be put, the duty of the seller in respect of its fitness came to be over and above that of the ordinary implied warrandice. In *Baird v. Pagan* (1765)<sup>7</sup> the seller sold a quantity of strong ale to the buyer for the particular purpose of being exported to the West Indies. Because of some latent defects the ale was not able to answer the purpose for which it was bought. The seller brought an action for the price but his claim failed. He had failed to fulfill his obligation to supply goods which were fit for the buyer's particular purpose.

Goods were usually bought and sold with reference to their names, and names were attached for a variety of reasons, but chiefly for the purpose of identification and also to describe the character to which the goods must correspond. From this the law developed a warrandice of correspondence with description. In *Adamson v. Smith* (1799)<sup>8</sup> there was sale of annual rye-grass seed as perennial seed. The buyer brought an action against the seller for damages. The seller admitted on oath that in the negotiations for the sale of the seed, the buyer had told him that if it was annual seed he would not purchase it on any account. The court held that the buyer had concluded the bargain in the belief that the seed was perennial and that the seller, who was uncertain as to what it was, had concealed his uncertainty in order to induce the buyer to go ahead with the sale. The seller was then held liable to restore price and interest. The case of *Dickson v. Kincaid* (1808)<sup>9</sup> also involved a claim for damages for the sale of goods - Swedish turnip-

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<sup>7</sup> (1765) M 14244.

<sup>8</sup> (1799) M 14244.

<sup>9</sup> Dec. 15 1808 F.C.



seed - which turned out to be Swedish turnip-seed of a very poor kind. Although the seller was acting bona fide throughout, he was held liable in damages under both the implied warranty of the contract of sale that the thing sold should be of the kind described and under the express warranty that the commodity was good and sound.

Following from the discussion of the duties of the seller, it is necessary next to discuss the remedies available to the buyer. One of them was the right of rejection. This remedy was equivalent to the remedy under the **aedilician edict of actio redhibitoria**, whereby the buyer was given the right to reject the goods and cancel the sale within six months from the time the defects were discovered. In Scotland, the buyer had the right to reject goods which were different in kind and quality from the ones agreed. The buyer could reject by intimating to the seller his intention of rejecting and by returning the goods to the seller as soon as he possibly could. The right of rejection was lost if the buyer had accepted the goods either by keeping them beyond reasonable time or by using or consuming them.<sup>10</sup> Therefore, to preserve the right of rejection, the buyer had to examine the goods without delay and to reject and return them upon the discovery of the defects. Lapse of time would amount to an acceptance.

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<sup>10</sup> Wright, "The Differences Between the Laws of England and Scotland as to the Contract of Sale", *Journal of Jurisprudence*, 1872, p. 403.

In *Ransan v. Mitchell* (1845)<sup>11</sup> the defendant bought a cargo of cork from the plaintiff, to be shipped at a foreign port and delivered to Glasgow. When the goods arrived, the defendant inspected and rejected them as being an inferior quality. Sometime later the defendant used the goods. The plaintiff brought an action for the balance of the price. It was held that the defendant had lost the right to reject the goods. The inferior quality of the goods would have entitled the defendant to repudiate the contract altogether. But by taking and using them, he had adopted the contract.

As mentioned earlier, delay by the buyer would bar him from rejecting the goods. Where the defects were latent it would take time to become apparent. Under the Roman law, **actio redhibitoria** was limited to six months after the defects were discovered, but under the Scots law there was no specified period for rejection. According to M.P. Brown, this was an arbitrary question determined by the circumstances of the case.<sup>12</sup>

The second remedy available to the buyer was a claim for damages and this remedy accrued only after rescission and the return of the goods to the buyer. This remedy was equivalent to the Roman **actio quanti minoris**. The buyer could not keep the goods and claim from the seller as much of the price as exceeded what the buyer would have paid had he known of the defect<sup>13</sup>. During the time of Stair and Bankton, **actio quanti minoris**

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<sup>11</sup> (1845) 7 D 813.

<sup>12</sup> M.P. Brown, *Treatise on the Law of Sale*, p. 310.

<sup>13</sup> Gloag, *The Law of Contract*, P. 193; *The Merchantile and Industrial Law of Scotland*, 1964, p. 205.

was part of the law of Scotland. But by the time of Erskine, it was beginning to be confused with **laesio enormis**, which was never accepted by the Scots law. Both remedies were distinct but had one similarity, i.e. as damages, both normally offered a reduction in price paid. The remedies differed in the fundamental respect of their cause. In **laesio enormis** it was a simple disproportion in price paid and the true value while in the other it was the sale of defective goods<sup>14</sup>. Confusion crept in because of the use of the term **actio quanti minoris**. However, the *actio quanti minoris* which was accepted was to reduce price due to a defect in the goods. This was nothing other than the ordinary action on the contract of sale. The one that was rejected was the reduction of price due to disproportion between the value of the thing and the price actually paid. By the nineteenth century the two remedies were no longer distinct from each other and because of that the buyer was deprived of a right to damages in certain circumstances.

The state of the law prevailing in the nineteenth century is reflected through the cases. In *Amaan v. Handyside & Henderson* (1865)<sup>15</sup> there was a sale of a steamer of which the boiler was described as being eighteen months old when in fact it was already five years old. The buyer brought an action against the seller claiming damages for the fraud of the latter. The seller argued that, if that was so, the buyer could rescind the contract, but could not retain the object and claim for the reduction in the price. Lord

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<sup>14</sup> Robin Evans-Jones, "The History of the *Actio Quanti Minoris* in Scotland", *Juridical Review*, 1991, p. 190

<sup>15</sup> (1865) 3 M 526.

Ordinary (Kinloch) said in his judgement that the law of Scotland rejected the **actio quanti minoris** and this was a “traditional maxim of the law”. It was the principle of law that the sanctity of contract should be upheld and if the buyer was not entitled or not disposed to throw up his bargain, he had to be content with what he had and pay the full price contracted for. It was said further that the **actio redhibitoria** and the **actio quanti minoris** were available to a buyer “who had received an article different from that which had been ostensibly sold to him.” It can be inferred from this sentence that the basis of the action was error. If the article was so defective that it became something different from what he had bargained for, the buyer was entitled to rescind the contract.<sup>16</sup>

In *McCormick & Co. v. Rittmeyer* (1869)<sup>17</sup> the cause of action was over a sale of hemp of an inferior quality. The buyer ordered 100 bales of prime cordage hemp from the seller. He then made a second order for the same amount on the same terms. The seller shipped the first order in two instalments and these were accepted and resold to the buyer. Of the second order, the seller shipped 35 bales but these were rejected. The buyer claimed damages for the inferior quality of the goods of the first and second orders. It was held by the court that the claim for damages in respect of the second order was justified because the goods did not conform to order. However, the claim in respect of the

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<sup>16</sup> Evans- Jones, op cit., p. 206.

<sup>17</sup> (1869) 7 M 854.

first order did not succeed because the goods were not rejected. Lord President Inglis stated that:-

“When a purchaser receives delivery of goods as in fulfilment of a contract of sale, and thereafter finds that the goods are not conform to order, his only remedy is to reject the goods and rescind the contract ..... The purchaser is not entitled to retain the goods and demand an abatement from the contract price corresponding to the disconformity of the goods to order, for this would be to substitute a new and different contract for that contract of sale which was originally made by the parties, or it would resolve into a claim of the nature of the **actio quanti minoris**, which our law entirely rejects.”

This case was decided after the passing of the Mercantile Law (Amendment) Act 1856, which removed the implied warrandice at common law in respect of defective goods. The court in this case drew a distinction between a claim for defective goods and claim for the supply of goods which did not conform to order. The buyer was allowed damages on the second ground.

The above two cases concerned the sale of goods. As for sale of heritage the leading case is *Loultit's Trs v. Highland Rwy* (1892).<sup>18</sup> In this case the judges took the

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<sup>18</sup> (1892) 19 F. 791.

opportunity to express their views on the **actio quanti minoris**. Both Lord President Robertson and Lord Adam agreed that it was not a competent form of action for the buyer to retain possession of the heritage and at the same time claim damages for the difference in value between a clear and a restricted title. But the peculiar thing in this case was that the seller had not taken any objection to it. Lord McLaren made some important comments. He said:-

“There are only two remedies open to the purchaser which are known to our jurisprudence. He has in the first place the right to rescind the contract conditional on his rejecting the goods or heritable property, and to claim damages proportioned to the inconvenience to which he has been put by the non-fulfilment of the contract. His other remedy is the **actio quanti minoris**, the proper application of which is to the case of latent infirmity either in the title or the quality of the subjects sold, discovered when the matters are no longer entire. At one time it was doubtful whether we had this form of action in relation to sales of movable property, but it was never doubted that under the claim of warrandice such a right did belong to the purchaser of heritable estate, who discovered that some part of the subject of sale had not been conveyed to him.”



The statement of his Lordship seem to broaden the application of the **actio quanti minoris** to cases of defective title. It went a step further than what was said in *McCormick's* case, in that the **actio quanti minoris** was applicable in cases when the goods delivered did not conform to contract.

In comparison between the English and the Scots common law, the latter had a wider concept of warrandice than the former. The English implied warranty can only be found in cases of sale of unascertained goods by description. Where the buyer had not seen the goods and only bought it on reliance of the description given by the seller, then there would be an implied warranty that the goods should answer that description. And under some circumstances, i.e. where the buyer had made known to the seller the particular purpose for which the goods were required, the law would imply a warranty that the goods must be fit for that particular purpose. Under Scots law the seller was to warrant that the thing sold was free from such defects as to render it unfit for the use for which it was intended. It was immaterial whether the sale was of specific or unascertained goods. A buyer could be rest assured that he was sufficiently protected under the law.

Secondly, the general rule of the English law was **caveat emptor**, whereby it was for the buyer to make sure that he was not cheated. The principle of Scots law was that every man selling an article was bound, though nothing was said about quality, to supply goods free from defects. These obligations were imposed unless there were circumstances



to show that an inferior article was agreed upon. This developed from the understanding that a sale was a bona fide bargain of the parties. The seller should contemplate that goods were bought for certain use and purpose and were price-worthy.

Thirdly, under English law there was no warranty of fitness for ordinary purposes but only for particular purpose. Even this was restricted to sale of unascertained goods. The buyer must have made known to the seller the particular purpose for which the goods were required so as to show that he was relying on the seller's skill and judgment. If there was anything to suggest otherwise, then the seller could not be made responsible. Under Scots law the seller had a duty to supply a commodity which was fit and serviceable for the uses to which it was commonly put. It was immaterial whether the seller dealt with such goods or not, or what kind of sale it was. In a case where a buyer bought for an extraordinary or for a particular purpose which was other than the ordinary purpose, he had to expressly declare that particular purpose to the seller. This would create an obligation upon the seller which was over and above the already existing one.

Fourthly, English law categorised terms into warranty and condition. This caused some confusion because these words were capable of many meanings. Scots law, on the other hand, had no such distinction. Every implied warrandice was a material term and was therefore important. Thus, on the whole it would seem that Scots law was more favourable and fairer to the buyer than its English counterpart. Furthermore, Scottish

judges were more lenient than the English ones. In the Scottish case of *M'Lellan v. Gibson* (1848)<sup>19</sup> the buyer bought from the seller a landscape picture in exchange for three other pictures and £5. This action was brought by the buyer who claimed that the landscape painting which had been sold as an original was not so. Two issues came before the court: one was whether the seller had warranted the painting to be original and two, whether the buyer had been induced to enter into the contract by the false and fraudulent misrepresentation of the seller. In his direction to the jury the judge made no reference to the need for proving an absence of honest belief in the seller. It seems that, if a false statement was made, it was automatically considered fraudulent. Fraud was implied from the false statement by the seller.

As it stood during the middle of the nineteenth century, two different laws were in operation, one in England which was caveat emptor, the other in Scotland which was implied warrandice. However, the exception to the rule of caveat emptor had to some extent diminished the difference between the two systems. The Scots rule was difficult to implement because of the problem in ascertaining whether defects were latent or not at the time of the sale, or whether the buyer could easily detect the fault on inspection of the goods. It was also difficult to decide whether the defects were of a kind to render the goods unmerchantable. As a consequence, the Mercantile Law (Amendment) Act 1856 was passed.

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<sup>19</sup> (1848) 5 D 1032.

Before the passing of the Acts, the Mercantile Law Commission was set up and their task was to inquire and ascertain how far the mercantile laws of the different parts of the United Kingdom might be advantageously assimilated.<sup>20</sup> As far as the sale of goods was concerned, the report dealt with, among other things, the constitution of the contract, the liability of the buyer to be deprived of goods sold to him by third parties claiming a preferable right thereto, and warranty. As to the constitution of the contract, the Commissioners recommended that the law of England and Ireland should be assimilated to the simpler rule of the common law observed in Scotland. For obvious reasons, the important business of buying and selling ought not to be trammelled with unnecessary solemnities; such transaction if satisfactorily proven ought to be binding.<sup>21</sup>

As to the law of warranty, the report recommended that Scots law should be assimilated to that of the law of England, because the former rule tend to cause litigation. The problem was the difficulty in ascertaining whether the defect was latent or otherwise at the time of the sale and also whether or not the faults were of such as to render the goods of unmarketable quality. The recommendation was adopted and in section 5 of the Mercantile law (Amendment) Act 1856, the implied warranty of Scots law was removed from the sale of movables. Section 5 read:-

“Where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were

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<sup>20</sup> Second Report of the Mercantile Law Commission, Reports Commission, (4) 1854 – 5, vol. 18, p.6.

<sup>21</sup> *ibid.*

defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose.”

There were two limbs to the section:-

If at the time of the sale the seller had no knowledge that the goods were defective or of bad quality, it shall not be held that he had warranted their quality. Goods sold were, with all faults, at the risk of the buyer, unless:-

- (a) the seller gave an express warranty of their quality, or
- (b) he knew of the defect at the time of the sale, or
- (c) he expressly sold them for a specified and particular purpose.

By virtue of this section, **caveat emptor** was introduced into Scotland; and not only that, Scots rule became narrower than that of English rule because the implied warranty was only preserved in cases of goods expressly sold for a specified and particular purpose. This meant that the buyer must expressly tell the seller the particular purpose why he required the goods. The term would not be implied from trade usage or where the

buyer relied on the seller's skill and judgment. There would, however, be a warranty under English rule in such situation.

There is another, different, view of the effect of the 1856 Act. Gow opines that the Act neither destroyed nor replaced the common law with *caveat emptor* because it was restricted in its application to an instantaneous **emptio perfecta**, or a bargain or a sale of specific goods, and that only where the seller had no knowledge of any defect.<sup>22</sup> He declares that in any such contract there was to be implied a term that the buyer took with all faults. In so far as it applied to a sale of goods for a specified and particular purpose it was merely a declaration of the common law.<sup>23</sup> As such the common law was left untouched. I think however that even though the Act did not expressly destroy nor replace the common law with **caveat emptor**, it did to a certain extent change the Scots common law. Before the Act, Scotland did not know about **caveat emptor**, but it was introduced by section 5 of the 1856 Act, in relation to sale of specific goods and where the seller had no knowledge. Elaine Sutherland is also of the view that, by virtue of the Mercantile Law (Amendment) Act *caveat emptor* was for the first time began to have effect in Scotland.<sup>24</sup> According to her, the Act only applied to the sale of specific goods because there risk was capable of being passed to the buyer.<sup>25</sup>

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<sup>22</sup> Gow, **Mercantile and Industrial Law of Scotland**, 1964, p. 181.

<sup>23</sup> *Ibid*

<sup>24</sup> E. Sutherland, *op. cit.*, p. 33.

<sup>25</sup> *Ibid*.

Gow further says that as regard to sale for specific and particular purpose, the common law was left untouched. According to limb 2 of section 5, goods sold were, with all faults, at the risk of the buyer, except if they were sold for particular purpose. So, where the buyer bought for particular purpose, he could rely on the common law rule. It is important to note that there was a similar rule under the English common law whereby on a sale of goods by a manufacturer or dealer, to be applied to a particular purpose, it was a term in the contract that they should reasonably answer that purpose. So, I would think that section 5 was the provision of the English common law which was similar to the Scots common law. It is not correct for Gow to say that the Scots common law was left undestroyed or untouched for it was certainly affected in practice.

Another aspect of change brought about by the 1856 Act was the effect of contract of sale upon the right of property in goods. The notion of the right of property in the goods become relevant when considering matters of risk and rights against and of third parties. By the law of Scotland, property in the goods did not pass by virtue of the contract of sale, but only when there was delivery of the goods to the buyer. But although the property did not pass by the contract, as soon as the parties agreed as to the subject-matter and the price, the result was that risk passed to the buyer. This rule was changed when the Act was passed and by virtue of section 1:-



“Where the goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach the goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same; and the right of the purchaser to demand the delivery of such goods shall, from and after the date of such sale, be attachable by or transferable to the creditors of the purchaser.”

This section meant that goods sold, but not delivered, might be demanded to the exclusion of the creditors of the seller by:-

- (1) the buyer, or
- (2) his creditors, or
- (3) his sub-buyer;

subject to the satisfying the seller's lien for the price.<sup>26</sup> The creditors of the seller should be allowed to attach goods sold, but left in his custody, thus rendering the buyer's right to delivery infeasible.

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<sup>26</sup> “Mercantile Law Amendment Act”, **Journal of Jurisprudence**, vol. 1, 1857, p. 15.



Further assimilation of the two systems of law was made with the passing of the Sale of Goods Act, 1893. This did not happen without any criticisms and objections and this will be discussed in the next part.

## **(II) SALE OF GOODS ACT 1893**

During the nineteenth century, after the unification of England and Scotland, there was a great deal of codification of the law for the purpose of assimilation of the commercial law of the two countries. Among these codifications were the Bills of Exchange Act 1882, Factors Acts 1889 and Partnership Act 1890. It was necessary to assimilate the laws of England and Scotland because during the nineteenth century, commerce was booming, especially in Scotland. Trade between two neighbouring countries was made difficult by the existence of two different rules operating in each country. For this reason, the businessmen in Scotland moved to assimilate the commercial laws.

In the year 1879, Frederick Pollock drafted the Partnership Act of 1890. One year after Partnership Act was drafted, McKenzie Chalmers drafted the Bills of Exchange Act of 1882. This was a successful work by Chalmers. Further codification took place with the passing of the Factors Act of 1889.<sup>27</sup> All the above statutes were extended to Scotland

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<sup>27</sup> Rodger, "The Codification of Commercial Law in Victorian England", 1992, **Law Quarterly Review**, p. 570.

after some amendments were made. The other important codification was the Sale of Goods Act 1893 which will be discussed below.

Many observations pertaining to codification were made by Alan Rodger in his article. According to him, assimilation and codification was advocated by Scottish businessmen who were trading with England. They found that assimilation was necessary to unify the law on commerce, especially so when trade involved bills of exchange.<sup>28</sup> According to him, codification was not a drastic step and the problems talked about were mere exaggeration because, commercial law was based on the practice of merchants. Therefore, there was little variance between England and Scotland.<sup>29</sup> Next, he observes that the circumstances in the continent during the nineteenth century induced codification. After the outbreak of the Napoleonic War, Scotsmen no longer went to the Netherlands, instead they went to Germany. At that time the Germans had their commercial law codified into the Commercial Code. Their success had influenced the Scotsmen to have their own codified commercial law.<sup>30</sup>

Codification was the main agenda for the legislature not only for England and Scotland, but also for the colonies throughout the Empire. In India, its commercial law was chiefly a codification of the English law, for example, Contracts Act 1872, Sale of

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<sup>28</sup> Id. p. 587.

<sup>29</sup> Ibid.

<sup>30</sup> id. p. 588.

Goods Act 1930, and Partnership Act 1932. The British came to India for purposes of trade and by virtue of a Royal Charter in 1600, The East India Company was formed. The Company had powers to make orders, laws and also ordinance which were not contrary to the local laws and customs.<sup>31</sup> The Indian Sale of Goods Act is based largely upon the 1893 Act; however, the particular conditions of India called for provisions in some respect different from those in force in England.

#### **(a) BACKGROUND TO THE SALE OF GOODS ACT**

The Sale of Goods Bill was framed by Sir Mackenzie Chalmers in the year 1888. He was then the judge of the Birmingham County Court. His great experience in a busy commercial centre afforded him special advantages in dealing with the subject of sale. He had already been responsible for the successful Bill of Exchange Act 1882 which pioneered the work of codification in England.<sup>32</sup> Chalmers' Sale of Goods Bill was considered by Lord Bramwell, who made various suggestions to adjust it. Lord Bramwell, a judge, was one of the members of the House of Lords' Select Committee. It was also revised by Lord Herschell with the draftsman. He took upon himself the responsibility that the Bill had been made as perfect as possible.<sup>33</sup> Lord Herschell was the

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<sup>31</sup> Dr. S. Ventakaraman, Krishna Murthy and Ramamoorthy, **The Law of Contracts**, 5<sup>th</sup> ed., 1990, p. 2.

<sup>32</sup> R. Brown, "The Sale of Goods Bill", **The Scottish Law Review**, vol. 8, 1892, p. 149.

<sup>33</sup> March 17, 1891, Hansard Third Series, vol. 351 col. 1183.

Lord Chancellor in 1886 and once again from 1892 to 1895. His efforts were more in politics rather than in judiciary.<sup>34</sup>

The Bill was first introduced in the House of Lords at the end of the 1888 Parliamentary session<sup>35</sup> and was reintroduced in the next session with some modifications. The Bill was presented again by Lord Herschell in March 1891 and in moving the second reading in the House of Lords, he stated in his speech the objectives of codification of the law and its advantages and disadvantages.<sup>36</sup> According to him,

“whilst at one time there was a disposition to exaggerate the effect and advantages of codification and to suggest that codification could put to an end to the necessity for lawyers and litigation; on the other hand there was perhaps, a disposition to depreciate the advantages of codification which are real. But nevertheless, the advantage of codification far outweighs its disadvantages.”<sup>37</sup>

According to him, among these advantages are:-

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<sup>34</sup> Simpson, ed., **Biographical Dictionary of the Common Law**, ed. 1984, p. 236 – 7.

<sup>35</sup> August 8, 1888, Hansard Third Series, vol. 330 cols. 70-71.

<sup>36</sup> March 17, Hansard Third Series, vol. 351 col 1181 –1182.

<sup>37</sup> Ibid.

(1) Codification makes the law certain on a particular point rather than having to consult textbooks and authorities. (2) It is likely to diminish the amount of litigation. (3) The law codified will be adopted by the colonies and thus would create a uniform law in the mother country and in the greater proportion of self-governing colonies.

Lord Herschell went on to say that, with the codification of the law of sale of goods, it was hoped to establish a similar mercantile law for all parts of Her Majesty's dominions where English law prevailed. It would be for the benefit of commerce within the Empire. There was, however, no mention of extending the Bill to Scotland and in fact when the Bill was first drafted, it was made applicable to England and Ireland alone.<sup>38</sup> It was not until in the 1892 session that there was any mention in Parliament of the Bill being extended to Scotland,<sup>39</sup> even though the view that it should be had manifested itself as early as 1889 among Scottish lawyers and merchants.<sup>40</sup> According to a writer in the *Juridical Review*, the Bill, in its original form, would lose much of its value and would result in a "sharper conflict in mercantile transactions of Glasgow and Liverpool or Leith and Newcastle as regards to legal rights and remedies."<sup>41</sup> Scottish interests, like the Faculty of Advocates, Aberdeen Chamber of Commerce, Glasgow Chamber of Commerce and Glasgow Faculty of Procurators, fought hard to make the Bill applicable to Scotland.

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<sup>38</sup> J.G.S., "Sale of Goods Bill", vol. 1 1889, *The Juridical Review*, p. 310, at p. 311.

<sup>39</sup> Hansard Fourth Series, vol.4 col. 1093.

<sup>40</sup> Vol. 1, 1889, *Juridical Review*.

<sup>41</sup> J.G.S., op. cit., 311.

The Glasgow Faculty of Procurators appointed a Bills Committee in June 1889 to revise and report on the Bill. The policy was to bring the law of the two kingdoms, as regard sale, into closer agreement by fixing distinctly the points on which they agreed.<sup>42</sup> Nothing much happened until 1891 when the Glasgow Chamber of Commerce prepared a petition which referred to the great and general advantages of assimilating the laws on sale of goods and sent it to Lord Watson for presentation in the House of Lords.<sup>43</sup> Lord Watson put down amendments to the Bill to make it applicable to Scotland. The amendments with their objects were intimated for the third reading by Lord Watson but were too late for consideration by the House for the session.<sup>44</sup> However, it formed valuable groundwork for adaptation in the future session.

The primary difficulty in adapting the Bill to Scotland originated in the very root of sale, i.e. the concept of passage of property.<sup>45</sup> Under the English rule, in an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passed to the buyer when the contract was made and it was immaterial whether the time of payment or time of delivery or both was postponed. Under the Scots rule, property would only pass to the buyer upon actual or constructive delivery of the goods. A seller of undelivered goods remained undivested of the property in them. Although property did

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<sup>42</sup> Ibid.

<sup>43</sup> Alan Rodger, "The Codification of Commercial Law in Victorian Britain", **Law Quarterly Review**, vol. 109, 1992, p.570, at p. 582.

<sup>44</sup> R. Brown, "Assimilation of the Law of Sale", **Juridical Review**, vol. 3, 1891, p. 297.

<sup>45</sup> Ibid.



not pass to the buyer, risk could. Unlike the English rule, in Scotland, property and risk were separate. This principle was not affected by the Mercantile Law Amendment Act 1856 because that Act did not enact that the contract of sale transferred the right of property to the buyer. It only provided that the buyer, having acquired certain rights i.e. **jus ad rem** - a right of action against the seller, transmissible to a sub-buyer and a right against seller's creditor,- incurred a corresponding obligation under the contract.<sup>46</sup> The corresponding obligation intended was risk. According to Bell, "risk is not a test of property (as in England). It forms a point in the law of obligation not in the law of transference."<sup>47</sup>

Richard Brown commented that the Scots rule was inconsistent when put in application. A seller who remained the owner was not subject to the most ordinary incidents of ownership, i.e. to suffer risk, while a buyer who had no ownership was. A seller being debtor for delivery of a specific subject which perished without his fault, was freed from an obligation which became impossible; but a buyer remained bound, under a possible obligation.<sup>48</sup> What was proposed by Lord Watson in his amendments to the Bill was to assimilate the two rules by yielding up the Scots rule.<sup>49</sup> His other proposal was to

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<sup>46</sup> Anonymous, "The Mercantile Law Amendment Act", **Journal of Jurisprudence**, vol. 1. 1857, p.13, at p. 15; Wright, T.G., "The Differences Between the Laws of England and Scotland as to the Contract of Sale", **Journal of Jurisprudence**, vol.16, 1872, p.402, at p. 406-408.

<sup>47</sup> Bell I Comm. 180.

<sup>48</sup> R. Brown, **Juridical Review**, vol. 3, 1891, p. 298-299.

<sup>49</sup> *Ibid.*

introduce the **actio quanti minoris** - reduction in price or damages,- into Scotland. Absence of such remedy had occasioned inconvenience, especially where the subject-matter of the sale had been partially used, or had changed in its nature, before discovery of the defect forming part of the breach.<sup>50</sup>

The issue of **actio quanti minoris** was also raised by the Bills Committee of the Glasgow Faculty of Procurators in their recommendations for amendments to the Sale of Goods Bill. In their report they suggested that the *actio quanti minoris* should be adopted in Scotland but the English rules as to warranties should be rejected.<sup>51</sup> Their proposal was embodied in the form of clause 12.<sup>52</sup> It reads:-

1. In England and Ireland -
  - (a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

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<sup>50</sup> *id.* p. 303.

<sup>51</sup> R. Brown, *The Scottish Law Review*, vol. 8, 1892, p. 150.

<sup>52</sup> *Id.* p. 151.

- (b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not a right to treat the contract as repudiated, depends in each case on the construction of the contract.
- (c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or the contract was for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a condition in the contract to that effect.

2. In Scotland -

- (a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or elect to treat the breach of such condition as a breach which may give rise to a claim for damages.
- (b) Failure to perform any material part of a contract of sale is in general a breach of contract which entitles the party not at fault to reject the goods and treat the contract as repudiated, and it depends on the circumstances and equities of each

case whether the contract can be treated as repudiated or the breach complained of falls to be satisfied by damages.

This proposal by the Glasgow Faculty was criticised by Richard Brown, who was a member of the Faculty's Bill Committee.<sup>53</sup> According to him, the proposal would only result in great difficulty because the **actio quanti minoris** or damages was closely connected with the English principle of warranties. In England a stipulation in a contract of sale could either be a condition, which entitled the innocent party to repudiate on breach, or a warranty which gave rise to a claim for damages. However, breach of a condition might be waived as a breach of warranty and a claim for damages made in lieu of a repudiation. The English section of clause 12 was merely a codification of the existing law. Not so with regard to Scotland; all warranties were conditions and the innocent party, whether seller or buyer, could claim rescission of the contract, restitution of the goods or price and damages for the breach.<sup>54</sup> Thus, a faultless buyer who had received the goods must return them to the seller and put him in his original position as if the contract had never been entered into; only then could he claim damages. Damages was not a remedy in lieu of rescission but a remedy after rescission had been made.

To have a sub-section as in 2(a) was to admit the English principle of warranties because although no mention of the word "warranty" was made, the effect talked about

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<sup>53</sup> Ibid.

<sup>54</sup> id. p. 152.

was precisely that of a breach of a warranty, i.e. a claim for damages. As for sub-section 2(b), it contradicted the previous sub-section which provided for either a repudiation or a claim for damages. The sub-section in itself contradicted its own provision. The words "the party not in fault" suggested the rights and remedies for both seller and buyer, but the only remedy specified in the sub-section was that of a buyer, i.e. rejection of the goods. Brown's solution to this problem was either to accept or reject the whole of the English rules of **actio quanti minoris** and warranty.<sup>55</sup>

Brown's criticism of the Committee's proposal was attacked by John A. Spens who accused him of want of loyalty to the Committee for which he was a convener.<sup>56</sup> Spens was also a member of the same Committee. In his defence, Brown replied that the article was written in June 1892, while the Committee had ceased to exist in December 1891.<sup>57</sup> During that six month period he had been communicating and corresponding with the framer of the Bill, from whom he had gained valuable suggestions. He had increased doubts as to whether the benefits of assimilation in the matter of **actio quanti minoris** outweighed the disadvantages associated with the principle itself. He was convinced that "to admit the **actio quanti minoris** into Scotland in the form in which it is recognised in

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<sup>55</sup> Ibid.

<sup>56</sup> *Scottish Law Review*, Vol. 1, 1893, p. 74

<sup>57</sup> Id. p. 106.

England, and at the same time to attempt to exclude the English rules as to warranty would be a serious blunder."<sup>58</sup>

During the 1892 session, the Bill with the Scottish amendments made no progress. Lord Herschell, who had become the Lord Chancellor, reintroduced the Bill in February 1893 without the Scottish amendments. The Scottish amendments would be introduced if the position could be agreed. Lord Watson, who was in favour of extending the Bill to Scotland, said that the differences of opinion upon some points were comparatively trivial and would not justify dropping the Bill.<sup>59</sup> A fortnight later the Scottish amendments were back in the Bill.<sup>60</sup>

After passing the House of Lords for the third time, the Bill made its initial venture in the House of Commons. The Bill was read for the first time on 21st. April 1893 and a second time on 21st. June 1893. A Select Committee was nominated on 24th. July 1893. It consisted of Sir Charles Russell, A.G.; Sir R. Webster, Q.C.; Mr. Asher, Q.C. (Scots Solicitor-General); Mr. Shiress Will, Q.C.; Mr. Bousfield, Q.C.; Mr. Ambrose, Q.C.; and Mr. Mather. The Select Committee completed their labours and presented their report on 15th. August 1893. Considerable alterations were made and the Bill was much improved. Clause 12, proposed by the Glasgow Faculty of Procurators was re-drafted. The clause

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<sup>58</sup> Id. p. 107.

<sup>59</sup> February 21, 1893, Hansard Fourth Series, vol. 9, cols. 4-5.

<sup>60</sup> March 6, 1893, Hansard Fourth Series, vol. 9, col. 1069.



became clause 11 and the Scottish provision became sub-section 4. It came in the following form:-

“In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer, either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.”<sup>61</sup>

By such clause the buyer was given the option between the **actio redhibitoria** or **actio quanti minoris**. This power was in accordance with the rule of the civil law which gives similar option to the buyer within specific period of time.<sup>62</sup>

The Bill passed its third reading in the Commons on 15th. September 1893. The Commons made some amendments to the Bill but they were not approved by the Lords, who made further amendments to those amendments. The Bill finally received the Royal Assent on 20th. February 1894 and was passed as the Sale of Goods Act 1893. The Act was entitled “An Act for codifying the law relating to the Sale of Goods.” The purpose of a codifying enactment is to present an orderly and authoritative statement of the leading rules of a law on a given subject, whether those rules are to be found in statute law or

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<sup>61</sup> R. Brown, “Sale of Goods as Amended”, **Scottish Law Review**, vol. 9, 1893, p.212, at p. 214.

<sup>62</sup> Ibid.

common law.<sup>63</sup> But the Act did not succeed in presenting a codified law on sale of goods. Being a code, it should have stated the whole body of the law. However, the 1893 Act was far from being all-embracing, only presented the statement of principles derived from cases decided during the nineteenth century.<sup>64</sup> If there was any point of law which had not arisen before, there would be no provision for it in the Act because it made no allowance for such potential disputes. Therefore, it would not be easy to apply the code to the modern conditions. Secondly, the Act reflected the nineteenth century concept of trade and law and these have now changed. For example, "merchantability" would relate to "merchants" rather than to "consumers" and to natural products rather than to manufactured goods.<sup>65</sup>

#### **(b) THE EFFECTS OF THE SALE OF GOODS ACT 1893**

The effect of the 1893 codification of the law of sale was that now a common legislated code was superimposed upon two fundamentally divergent legal systems. The new Sale of Goods Act 1893 made little change to the law of England because it was basically a codification of the existing common law.<sup>66</sup> The conscious changes effected in the law were very slight. But as far as Scotland was concerned, many of its provisions were

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<sup>63</sup> Benjamin on Sale of Goods, p.4.

<sup>64</sup> Introduction to the First Edition by Chalmers.

<sup>65</sup> See Law Commission Report No. 160 on Sale and Supply of Goods.

<sup>66</sup> August 14, 1893, Hansard Fourth Series, vol. 16, col. 1053

entirely novel and subverted principles and practice which had ruled Scottish legal decisions for centuries. Among the major changes in the Scottish law were:-

- (i) The passage of property in specific goods sold but not delivered.
- (ii) The introduction of **actio quanti minoris**.
- (iii) Alterations as to representation or warranty.

**(i) Passing of Property.**

By English law, in a sale of specific goods in a deliverable state, the property in the goods passes to the buyer irrespective of whether delivery and/or payment of price are/is postponed,<sup>67</sup> and risk, prima facie, passes with property. Therefore, when nothing else need be done by the seller to effect delivery, the goods are said to be in a deliverable state. In Scotland, the property in the goods did not pass to the buyer by virtue of the contract of sale but when there was delivery, actual or constructive. But although property did not pass, as soon as the parties agreed as to the subject-matter and the price, risk passed to the buyer. By virtue of the Act, sections 17, 18 and 20, the same rules, substantially English ones, were applicable to both countries.

**(ii) Actio Quanti Minoris.**

In England a stipulation can either be a condition or a warranty and there are also circumstances when a condition can be treated as a warranty. Where there is a breach of a

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<sup>67</sup> Wright, op. cit., p. 405-406.

condition, the remedy would be repudiation and if there is a breach of a warranty, the remedy is damages. In Scotland, there was no such division; all warranties were conditions and breach of them would give rise to a rescission. A claim for damages was only permissible after restitution of either the goods or price. Now under section 11(5) of the Act, the buyer had the right of repudiation or to retain the goods and treat the failure to perform such material part as a breach giving rise to a claim for compensation or damages. The damages are measured by the reduction of the price, in respect of sale of defective goods, equivalent to the reduction in value attributable to the defects.<sup>68</sup>

### (iii) Representation and Warranty

Another aspect of the changes made by the 1893 Act upon the law of England as well as Scotland was with regard to representation and warranty. The Act categorised representations or statements into either conditions or warranties. Breach of a condition entitled repudiation whereas breach of a warranty entitled only a claim of damages. In Scotland there was no such distinction and by section 61, a breach of warranty is deemed to be a failure to perform a material part of the contract. "Material part of the contract" thus meant that it was a condition. Breach of a condition led to a remedy of repudiation. But by section 11(5) of the Act, the unfortunate buyer had a choice of either to repudiate the contract or to retain the goods and claim damages. This section was said to have re-introduced the formerly rejected remedy of **actio quanti minoris** into Scotland.

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<sup>68</sup> Evans-Jones, "The History of Actio Quanti Minoris in Scotland", *Juridical Review*, 1991, p. 190; Alastair Stewart, "The Actio Quanti Minoris", *Journal of Law Society*, vol. 2, 1966, p. 124.

However, it was restricted to a situation where the buyer could not return the goods; for example, the buyer had used the goods.

The provisions of implied terms in the 1893 Act retained the English common law division between condition and warranty. In Scotland the distinction was between material and non-material parts of the contract. In *Turnbull v. McLean & Co.* (1874),<sup>69</sup> McLean & Co., coal merchants, contracted to supply Turnbull with coal. They agreed that the price was to be paid monthly. Turnbull refused to pay for the coal of a past month or even to make a payment to account. McLaren rescinded the contract and it was held that they were justified to do so. Lord Justice-Clerk Moncreiff expressed the principle as follows:-

“I understand the law of Scotland, in regard to mutual contracts, to be clear - first, that the stipulations on either side are the counterparts and the consideration given for each other; second, that a failure to perform any material or substantial part of the contract on the part of one will prevent him from suing the other for performance; and third, that where one party has refused or failed to perform his part of the contract in any material respect, the other is entitled either to insist for implement, claiming damages for the breach, or to rescind the contract altogether - except so far as it has been performed.”

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<sup>69</sup> (1874) 1 R 730.

Lord Neaves said;

“It is a general principle that all the material stipulations in a contract forming a **unum quid** (single entity) are mutual causes.”

In the case of *Lupton & Co. v. Schulze & Co.* (1900),<sup>70</sup> Lupton & Co. entered into a contract of sale of cloth to Schulze & Co. Part of the cloth did not conform to contract and Schulze & Co. rejected them. Rejection was intimidated to Lupton & Co. But instead of returning the cloth, Schulze & Co. retained them as security for claim of damages. Lupton & Co. brought an action against Schulze & Co. for the price and then Schulze & Co. brought an action against Lupton & Co. for damages. The two actions were joined. It was held that, having rejected the goods, it was wrong for Schulze & Co. to retain possession of the goods. They were liable to pay for the price and their claim against Lupton & Co. was dismissed. Lord Trayner said that:-

"The appellants had open to them an alternative course. They could reject the goods and place them at the disposal of the respondents, or they could keep the goods at the contract price, and claim damages on the ground that the sellers had failed to perform a material part of their contract. Between these alternatives the appellants had to choose; they could adopt either, but they must adopt one of them."

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<sup>70</sup> (1900) 2 F 1118.



From the above two cases it can be seen that where there is a breach of a material part of the contract, either failure to pay the price of coal or the goods which did not conform to the contract, the innocent party had the right to reject the goods and treat the contract as rescinded. The divergence in terminology between English and Scots law led to some uncertainty. It became unclear if the word “condition” should be read to mean “material part of the contract” and “warranty” to mean “non-material part of the contract”. I am inclined to say that the terms “condition” and “material part” could be used interchangeably because, both terms are used to describe the fundamental part of the contract which goes to the root of it. Breach of that fundamental part would affect the very existence of the contract.

### **(III) THE DEVELOPMENT OF THE IMPLIED TERMS**

Sections 12 to 15 of the Sale of Goods Act 1893 marked a diversion from the common law rule of **caveat emptor** because these sections codified the implied terms of title, description, fitness and merchantable quality. Although the Act appeared simple, but there were underlying problems. The Law Commissions of England and Scotland, set up in 1965, produced a report in 1969,<sup>71</sup> where they discussed two major problems of the Act, namely, the problems created by the practice of contracting out of the conditions and

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<sup>71</sup> Law Commission First Report: Amendments to the Sale of Goods Act 1893, No. 24, 1969

warranties implied by sections 12 - 15 of the 1893 Act<sup>72</sup> and the problems related to the operation of those sections. The Law Commissions went through these sections critically and, where necessary, recommendations were made. I would like to discuss the report of the Law Commissions because upon these recommendations, the Supply of Goods (Implied Terms) Act, 1973 was passed, which implied similar terms into contracts of hire-purchase and reformed the bases upon which terms were implied into contracts of sale.

**(a) LAW COMMISSIONS' FIRST REPORT: AMENDMENTS TO THE SALE OF GOODS ACT 1893**

**Section 12**

Section 12, under which the seller warrants the buyer's title, was made applicable to all contracts of sale "unless the circumstances of the contract are such as to show a different intention". This phrase meant that the term could be ousted by an express agreement between the parties as well as by the general provision under section 55. This section provided that where any right, duty or liability would arise under a contract by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract. Sale, by definition, is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a price. If section 12 could be excluded, there

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<sup>72</sup> Section 55 of the 1893 Act provided that, "Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract."

would be no sale at all. So, it was recommended by the Law Commissions that there should be some limitations of contracting-out by the seller. They also recommended that, where the seller purports to sell only such right or title that he or a third party may have, there should be no implied condition.

### **Section 13**

Section 13 implied that if sale is by description, the goods delivered must correspond with the description. The Law Commission criticised this section on two grounds. First, it adds very little to the law since if goods are described in the contract it is clearly an express term that the goods should fit that description. Second, it is misleading to say that the term as to description is a condition of the contract which could be excluded. The true position is, if a seller delivers goods which do not correspond to the description, he has not merely broken a condition of the contract but has entirely failed to perform it. Therefore, it imposes a fundamental obligation on the seller, breach of which goes to the root of the contract and the seller is deprived the benefit of the exemption clause.<sup>73</sup> Despite these criticisms, the Law Commissions found that there were little problems in practice and the Act provided buyers with great protection. The only recommendation made was to extend the meaning of "sale by description" to sale in self-service shops. For this reason, section 13 still exists in its original form with the addition of the recommendation to it. The recommendation came in subsection 3 and was included in the

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<sup>73</sup> Law Commission Report, No. 24, p. 7.

Supply of Goods (Implied Terms) Act 1973. It provides that a sale of goods is not prevented from being a sale by description by reason only that the goods being exposed for sale or hire, are selected by the buyer.

As mentioned earlier, any description of goods is really an express term or the spelling out of the express term, but section 13 implied a term that the seller should comply with the express term. This is odd and redundant because what section 13 is really saying is that "where the seller uses words of description which would otherwise amount to a condition, then it is an implied condition that the goods should comply with that description".<sup>74</sup> When there is an express term, it is not necessary to imply compliance. It is suggested that this section needs revision, if not outright repeal<sup>75</sup> which was not done even by the latest Sale and Supply of Goods Act 1994.

#### **Section 14**

This section was one of the most important provisions in the Sale of Goods Act 1893 because many cases involved defects in the quality of goods. It dealt with two different concepts of quality, i.e., fitness and merchantability. The opening words read,

"Subject to the provision of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale,..."

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<sup>74</sup> Atiyah, *Sale of Goods*, p. 133-134.

<sup>75</sup> Ibid.

The effect of these wordings was to retain the common law rule although greatly restricted. The Law Commissions did not recommend any changes in these opening words because they were necessary to restrict the application of the section to where the seller is acting in the course of business and to make it applicable to all goods supplied under a contract of sale.<sup>76</sup> However, they made these observations and recommendations.

Subsection (1) required that "the goods are of a description which it is in the course of the seller's business to supply". It was recommended that this should be implied into all sales other than private sales and would include a situation where the seller has not traded in goods of the relevant description before. Secondly, the Law Commissions recommended that the proviso for sale under patent or trade name be dispensed with it had become redundant. The subsection required prove of reliance on the seller's skill and judgment. Where there is no such reliance, that would mean that there is reliance on patent or trade name.

The final recommendation was as to the requirement that the buyer must make it known to the seller, the particular purpose for which the goods were required, so as to show that he had relied on the seller's skill and judgement. The law was, the condition of fitness is implied, if the goods were bought for their normal or obvious purpose. Reliance

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<sup>76</sup> Law Commissions Report, no. 24, p.10.

on the seller's skill and judgment was implied. But if the buyer required the goods for a particular purpose, that purpose should be expressly made known to the seller before the can be such reliance. In England, therefore, "particular purpose" would include goods bought for special or unusual purpose as well as goods bought for usual or normal purpose.<sup>77</sup> This had also caused some overlapping between subsections 1 and 2 of the 1893 Act. The Law Commissions recommended that subsection 1 should be re-worded to interpret the effect of purchase for usual purpose and the effect of sale for a special purpose. Secondly, there should be an adjustment to provide an alternative burden of proof for the seller. Instead of having to prove that the buyer had not relied on his skill and judgment, the seller had only to prove that it was not reasonable for the buyer to have relied on him.

As far as subsection 2 was concerned, there were some major problems attached to it. Among the problems were:-

- (1) There was no definition given to the term "merchantable quality".
- (2) It was only implied in sale by description.
- (3) It was a requirement that the seller should be in the course of business to supply.
- (4) The effect of the proviso (the opportunity of examination) actually protected buyers who did not inspect at all rather than protecting the buyers who did in fact examine, but could not detect the defects because the examination was carried out improperly or negligently.

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<sup>77</sup> id. p. 14.



- (5) The law did not make any distinction between new and used goods. As it stood, the buyer of a second-hand goods could expect them to be perfect.

To these problems, the Law Commissions recommended that, there should be a statutory definition for "merchantable quality", which would include description and price. So, if the goods are described as second-hand or if the price is low, then the buyer should not expect to them to be perfect in every way. It was also recommended that subsection 2 should be extended to all types of sale rather than only to sale by description. Finally, as regard the proviso, it was recommended that there should be a specific notice of the defect before the implied term could be excluded. It would mean that there must be actual examination and not a cursory one or the mere opportunity of examination.

## **Section 15**

By this section, a contract of sale is by sample only if there is a term, express or implied, to that effect. Mere exhibition of the sample to the buyer by the seller would not be sufficient to constitute a sale by sample. If there is a sale by sample, the law would imply that the bulk must correspond with the sample, the buyer must have a reasonable opportunity to compare the bulk with the sample and the goods must be free from the defect, rendering them unmerchantable, which would not be apparent on reasonable

inspection of the sample (subsection 2). There were not many problems here so as to cause the Law Commissions to make any recommendations.

All the above-mentioned implied terms could be contracted out by the seller by an express agreement or under the general provision of section 55 of the 1893 Act. The Law Commissions recommended that there should not be any contracting out of implied terms in all sales to private consumers, except in second-hand goods, and if there is such term of exclusion, it would be void.

#### **(b) SUPPLY OF GOODS (IMPLIED TERMS) ACT 1973**

These recommendations of the Law Commissions were adopted in the Supply of Goods (Implied Terms) Act 1973. The important thing about this Act is that, it extended the implied terms in Sale of Goods Act 1893, in amended form, to hire-purchase. Before this Act, in transactions other than sale, terms were implied under the common law because the Sale of Goods Act was not applicable. In 1973, the Supply of Goods (Implied Terms) Act was passed with these provisions.

Even though section 12 could not be exempted in all sales, but where the seller has a limited title to the goods, there is no implied term under section 12. However, this fact must be expressed or inferred from the circumstances of the case, that it is the seller's intention to transfer only limited title.

The Act extended the concept of sale by description to include goods which are specific and seen by the buyer. Formerly sale by description only applied to situations where the buyer had not seen the goods but relied on the seller's description of them. But there were cases where the courts had held that, even though the buyer had seen and inspected the goods, they would not cease to be a sale by description for as long as the buyer bought them relying on the seller's description of them.<sup>78</sup> The decisions of the courts made their way into the statute, whereby it is provided that, a sale of goods does not cease to be a sale by description by reason only that, being exposed for sale, they are selected by the buyer.<sup>79</sup>

The Act for the first time supplied a statutory definition to the word "merchantable quality". The definition included description and price. It also made merchantable quality applicable to other sales besides sale by description. Also, it replaces the phrase "deals in goods of that description" to "goods supplied under the contract". The significance of this change was that, merchantable quality was extended beyond the goods sold; it would include the containers in which the goods contained, the packaging and so on.

The other radical change made by the Supply of Goods (Implied Terms) Act 1973 was to restrict the power of the seller to contract out of his liability. In other words, the

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<sup>78</sup> *Beale v. Taylor* [1976] 1 WLR 1193; *Thornett & Fehr v. Beers & Sons* [1919] 1 KB 486.

<sup>79</sup> Section 13(3).

right granted under section 55 of the 1893 Act was greatly restricted and altered by the 1973 Act. The seller could not contract out of the implied term under section 12 and any exclusionary clause would be void. As for the other remaining sections, i.e. sections 13, 14 and 15, contracting out was void in relation to consumer sales. In 1977, the Unfair Contract Terms Act was passed, which provides for a more general control of the exclusionary clauses. It replaced the relevant provisions in the 1973 Act. The Unfair Contract Terms Act gives extensive powers to the courts to strike down exclusionary clauses, especially in consumers' contracts.

#### **(c) SALE OF GOODS ACT 1979**

The Sale of Goods Act 1979 is a consolidation Act whereby the original 1893 Act and with the various amendments made to it by subsequent legislation, were consolidated into a single Act. The function of a consolidating Act is to do away with various statutes on the same subject-matter, for easy reference. Therefore, much of the present law is based on the old law but with some amendments to it by subsequent legislation. It was said that because of this the Sale of Goods Act 1979 does not fully cover the area of consumer contracts and consumer protections. This, being a twentieth phenomenon is not dealt with by the common law which is the basis of the Act.<sup>80</sup> Consumer protections are therefore covered by other legislation.

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<sup>80</sup> Salvage and Bradgate, *op. cit.*, p. 142.

Section 12 of the Sale of Goods Act 1979 provides for the implied terms about title; namely, that the seller has the right to sell the goods, that they are free from any encumbrances and the buyer will enjoy a quiet possession of them. The first is a condition and the second two are warranties. This section is based on the 1973 Act. Subsection 3 provides for the circumstances where the seller may effectively avoid liability by, expressly or impliedly, indicating his intention to transfer limited title; for example, where an auctioneer or the sheriff sold an article, this subsection is applicable.<sup>81</sup>

Section 13 of the 1979 Act is a reproduction of the 1893 Act with the extended application of sale by description to specific goods in accordance to the 1973 Act. Section 14 contained major changes from the old Act and these changes are made by the 1973 Act, which are incorporated into the Sale of Goods Act 1979. Subsection 1 lays down the common law rule of **caveat emptor**, i.e., there is no implied conditions of quality or fitness for any particular purpose. The exceptions are found in subsections 2 (merchantable quality) and 3 (fitness for particular purpose). Subsection 2 states that "where the seller sells in the course of business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except where the defects are specifically drawn to the buyer's attention or if the buyer examines the goods, as regards defects which that examination ought to reveal." Subsection 6 gives the meaning of what is "merchantable quality". Goods are merchantable if they are fit for the purpose/s

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<sup>81</sup> Benjamin's Sale of Goods, ed. By A.G.Guest, 3<sup>rd</sup> ed., p. 168.

for which goods of that kind are commonly bought as it is reasonable to expect having regard to their description, price and all other relevant circumstances. Fitness “as it is reasonable to expect” means that the goods are not expected to be perfectly fit for use having regard to the factors mentioned therein. This had lowered the standard of fitness and this can be seen from the following cases.

In *Cehave v. Bremer* (1976)<sup>82</sup> there was a sale of citrus pulp pellets, some of which were damaged due to over-heating. The buyer rejected the goods. The court held that even though the goods were far from perfect, they were nevertheless merchantable because they were as fit for the required purpose as it was reasonable to expect. The facts of the case showed that the goods were actually used for that purpose. Although some were damaged, that would not go to the extent of giving the buyer the right to reject. The proper remedy was an allowance against the price.

The decision in the above case was echoed in the Scottish case of *Millars of Falkirk Ltd. v. Turpie* (1976)<sup>83</sup> whereby a new car with some defects was held to be merchantable because the court considered these relevant factors, i.e, the defect was minor and could be readily and easily cured at a small cost, the seller was willing and anxious to cure the defect, the risk of danger was slight, and many new cars have some defects and the defect in this particular car was not exceptional.

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<sup>82</sup> [1976] QB 44.

<sup>83</sup> 1976 SLT 66.



Subsection 3 was formerly subsection 1 of the 1893 Act. This subsection also requires the seller to be in the course of business, so, a private sale is excluded from this implied condition. The buyer must, expressly or by implication, make it known to the seller the particular purpose for which the goods are bought. This signifies reliance on the seller's skill and judgment. The seller is not liable if there is no reliance or if it is not reasonable to rely on his skill and judgment. This is a radical change from the former subsection 1. Previously, if the buyer requires for a particular purpose, he had to make it known to the seller that particular purpose in order to show reliance. Now, there can either be an express or implied notification of use to the seller, and reliance will be presumed. The duty is on the seller to disprove reliance or that it is not reasonable to rely on his skill and judgment.

There have been many changes made in respect of the 1979 Sale of Goods Act, but nevertheless there are still many more loop holes in it. Despite being a code, it is not all embracing. Its greatest drawback is its limitation in application to only contracts of sale of goods. Contracts for supply of goods and services are excluded from this Act. Because of this particular weakness, in 1982 the Supply of Goods and Services Act was passed. But the 1982 Act applied only to England and Wales, and not to Scotland. This Act is based on the recommendations of the Law Commissions on the Implied Terms in

Contracts for the Supply of Goods 1979.<sup>84</sup> Their starting point for inquiry was that the obligations of a supplier in relation to the goods supplied should be the same whatever the kind of contract employed.<sup>85</sup> Suppliers of work and materials should be under the same obligations as sellers of goods.

**(d) SUPPLY OF GOODS AND SERVICES ACT 1982**

The Supply of Goods and Services Act 1982 was passed to extend the application of the implied terms similar to those under the Sale of Goods Act 1979 to contracts analogous to sale. These are the "contracts for the transfer of goods" whereby one person transfers or agrees to transfer to another the property in goods (section 1 (1)). Excluded in this definition are contract of sale, hire-purchase (regulated by 1973 Act), transfer of goods in exchange for trading stamps, transfer by deed and transfer to operate by way of mortgage, pledge, charge or other security (section 1 (2)). What is included are barter, hire, and contracts for work and materials. Prior to the 1982 Act, if the contract was a sale of goods, the implied terms under the Sale of Goods Act were applicable. But if the contract was for services, the supplier's duties were only to take due care. But if goods were supplied incidental to such contract, the supplier's duties were strict in regards the goods.<sup>86</sup> After the passing of the Act, similar terms as those implied under the sales contract by the Sale of Goods Act were implied into the contract for work and materials

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<sup>84</sup> Law Commissions Report: Implied Terms in Contract for the Supply of Goods, No. 95, 1979.

<sup>85</sup> *Id.* p. 11.

<sup>86</sup> Atiyah, *op. cit.*, 22-23.

(sections 3 - 5). The Act further requires the work performed under the contract to be carried out with reasonable skill and care (section 13).

When the Law Commissions made their report, it was confined to England and Wales only, because, according to them, the development of the law relating to contracts for the supply of goods other than sale and hire-purchase has been different in England from Scotland.<sup>87</sup> So, when the Act was passed, it applied only to England and Wales. Because of this, it was recommended in 1987 by the Law Commissions that the statutory implied terms should be extended to Scotland.<sup>88</sup> The recommendation was put before the Parliament in the form of the Consumer Guarantees Bill 1990 but fell through lack of Parliamentary time. The Act of 1982 was however, finally extended to Scotland by virtue of the recent enactment of the Sale and Supply of Goods Act 1994.

#### **(e) SALE AND SUPPLY OF GOODS ACT 1994**

The first thing to note about this Act is that it makes applicable an amended version of the Supply of Goods and Services Act 1982 to Scotland. By virtue of Schedule 1 of the Act, Part 1A, "Supply of Goods as respects Scotland", is inserted into the 1982 Act. There are now new sections ranging from sections 11A to 11L. The Act was passed to give effect to the Law Commissions' report made in 1987. This report examined the statutory implied terms in contracts for the sale of goods, remedies for breach of those terms and the loss of

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<sup>87</sup> Law Commissions' Report No. 95, p. 5.

<sup>88</sup> Law Commissions' Report: Sale and Supply of Goods, No. 160, 1987.

the right to reject non-conforming goods. The implied term of merchantable quality was greatly criticised on these grounds:-

- (1) The word "merchantable quality" is out-dated and is inappropriate in the context of consumer transactions because it is more suitable to natural products like grain, wool or flour.
- (2) The word concentrates on the fitness of the goods ignoring the other aspects of quality like appearance, finish, freedom from minor defects.
- (3) The Law Commissions questioned whether durability and safety could be considered in quality.<sup>89</sup>

The Law Commissions recommended that "merchantable quality" should be re-defined. The new definition should consist of two elements: a basic principle formulate in language sufficiently general to apply to all kinds of goods and all kinds of transaction; and a list of aspects of quality, any of which could be important in a particular case. The basic principle should be that the quality of goods sold or supplied under the contract should be such as would be acceptable to a reasonable person bearing in mind the description of the goods, their price (if relevant), and all the other circumstances. The list of the aspects of quality should include:

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<sup>89</sup> Id. p. 8-11.

- (1) the fitness of the goods for all their common purposes
- (2) their appearance and finish
- (3) their freedom from minor defects
- (4) their safety
- (5) their durability.<sup>90</sup>

The above recommendation was accepted into the 1994 Act, it provides that:-

(1) In section 14 of the Sale of Goods Act 1979 (implied terms about quality or fitness) for subsection (2) there is substituted –

“(2) Where the seller sells goods in the course of business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, price (if relevant) and all other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods -

fitness for all the purposes which goods of the kind in question are commonly supplied,

(b) appearance and finish,

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<sup>90</sup> Id., p. 22-35.

- (c) freedom from minor defects,
- (d) safety, and
- (e) durability.

(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory -

(a) which is specifically drawn to the buyer's attention before the contract is made, where the buyer examines the goods before the contract is made, which that examination ought to reveal, or in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample."

From the above provisions it can be seen that some aspects of the old law are retained, for example, there is still the requirement that the seller must sell in the course of business, and that the term would not be implied in relation to defects brought to the buyer's attention or where he examines the goods. However, the Act, implies that goods supplied under the contract must be of a satisfactory quality (the Law Commissions used the word "acceptable"). The goods are of satisfactory quality if a reasonable person would regard them so, taking into consideration the description, price and the relevant circumstances. This change has been in line with the trend of the courts to decide cases in



favour of consumers.<sup>91</sup> This Act has been long overdue and its enactment is very much welcomed.

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<sup>91</sup> *Rogers v. Parish Motors* [1987] QB 933; *Bernstein v. Pamsons Motors* [1987] 2 All ER 220; *Shine v. General Guarantee Corp.* [1988] 1 All ER 911.

## **CHAPTER THREE**

### **CONFORMITY WITH DESCRIPTION**

#### **INTRODUCTION**

In every sale transaction the duty of the seller is to deliver the contract goods. There are basically two ways of ascertaining the subject-matter of a sale. The first is by reference to the goods by their position in time and space; for example, "this pen in my hand" or "the car in the garage". The subject-matter in these examples is ascertained by being identified physically and, therefore, the goods are specific. Secondly, the subject-matter of the contract can be ascertained by reference to its description, for example, "a black leather bag". In defining the goods they may be described as possessing certain characteristics or features. Goods which are usually sold in this manner are goods which are not ascertained, or future goods. A sale in pursuance of the process of description is called a sale by description. Under section 13(1) of the Sale of Goods Act 1979, it provides that "where there is a contract for the sale of goods by description, there is an implied condition that the goods correspond with the description". By this section when goods are sold by description, the seller's duty to deliver goods in conformity with the description is an implied term. If he delivers something which is of a different kind than the one described, he is in breach.

In this chapter, I will discuss the background to sale by description, its meaning, scope and its relationship with merchantable quality. Prior to 1973, merchantable quality was only implied in sale by description, and because of this, the concept of "sale by description" was extended to include sale of specific goods (for purpose of quality). This wide interpretation of the term gave rise to many issues. Finally in 1973, sale by description was confirmed in the form found in subsection 3 of the Sale of Goods Act 1979. I will then discuss the elements of section 13; (1) what are descriptive words (identity or attributes), (2) they must be a term of the contract, (3) reliance on the description. In part three I will look at a similar provision in the Uniform Commercial Code of the United States of America.

## **(I) BACKGROUND OF SALE BY DESCRIPTION**

### **(a) SECTION 13 OF THE 1893 ACT**

When the draftsman first drafted section 13, he meant to distinguish between a sale of specific goods and a sale by description.<sup>1</sup> In case of the former, the rule was caveat emptor, which was against the buyer because there was no implied term.<sup>2</sup> But in the latter, the rule was more favourable to the buyer because, not only that the law implied a term of correspondence with the description, but also a term of merchantable quality.<sup>3</sup> In its

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<sup>1</sup> **Benjamin's Sale of Goods**, ed. A.G. Guest, 3<sup>rd</sup> ed. 1987, p. 436; Goode, **Commercial Law**, p. 235.

<sup>2</sup> *Barr v. Gibson* (1838) 3 M & W, 390; *Chandler v. Hopkins* (1838) 4 M & W, 399.

<sup>3</sup> *Gardiner v. Gray* (1815) 4 Camp. 144; *Nichol v. Godts* (1854) 10 Exch. 191.

original form found in section 13 of the 1893 Act, sale by description was a sale where the buyer had not seen the goods or had not the opportunity of inspecting the same, either because they were unascertained or because they were not in existence. In such a sale the court would hold that goods delivered must answer their description. Also the court would imply the term of merchantable quality. Thus, the seller's duty was not only to deliver goods which are genuine according to the name, kind and description specified in the contract, but also that they must be merchantable, i.e., of a quality to pass in the market under that description. To be merchantable, the goods must be reasonably fit for the ordinary uses to which the goods are put.<sup>4</sup>

The court implied conformity with description in sale of unascertained goods because the buyer did not see the goods but bought them relying on their description. Therefore, to protect him, the court implied conformity with description. It followed from this that, when the buyer could not inspect the goods, he could not judge their fitness, therefore it was thought that it would be reasonable to imply that the goods must be fit for their usual purpose/s. This was the reason why the law implied these two terms in sale of unascertained goods.

Since merchantable quality was only implied in sale by description, and sale by description only applied to unascertained or future goods, a buyer who bought specific goods but found them unfit had no recourse. It was felt necessary to extend the concept

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<sup>4</sup> Prosser, "The Implied Warranty of Merchantable Quality", *Canadian Bar Review*, 1943, p. 446, at p.

of sale by description. In mid-nineteenth century and early twentieth century, courts began to flex sale by description to sale of specific goods. In the case of *Shepherd v. Pybus* (1842)<sup>5</sup>, warranty of quality was implied in a sale of an admittedly specific barge which the buyer had inspected and in which the property had passed to him. The warranty was implied by law not because the buyer had the opportunity to inspect but because he had not been able to exercise his own judgement.

In *Varley v. Whipp* (1900)<sup>6</sup> it was held that sale by description must apply to cases where the buyer had not seen the goods but is relying on the description alone. In this case the parties met at Huddersfield where the seller sold a reaping machine, located at Upton, which he described as "a second-hand self-binder reaping machine new the previous year and very little used." The buyer did not see the machine and when it was delivered, the buyer discovered that it was neither new nor little used. He then returned it to the seller who later brought an action to recover the price. He argued that this was a sale of specific goods which were identified and agreed upon at the time of the sale. Property had passed to the buyer and he had lost his right to reject the goods. The seller's contention was rejected by the court and Channel J. stated that:-

"The term "sale by description" must apply to all cases where the purchaser has not seen the goods but is relying on the description

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<sup>5</sup> 3 M & G 868.

<sup>6</sup> [1900] 1 QB 513.

alone. It applies in a case like the present, where the buyer has never seen the article sold but has bought by description."<sup>7</sup>

The concept of sale by description as laid down by the above case is to cover all sales of specific goods where the buyer had not seen the goods either before or at the time of contracting, but was relying on description alone. This concept was later extended to cover situations where the buyer is contracting in the presence of the goods but had no opportunity to inspect them. The consequence of such an extension was to cause all retail sales to become sales by description. Holmes L.J. in the case of *Wallis v. Russell* (1902)<sup>8</sup> expressed his doubt as to the extension of the concept of sale by description because that would mean "no sale otherwise than sale by description would be possible". The courts were too eager to say that a particular sale is a sale by description; and as a result problems were created.

One of the problems is to maintain the common law dichotomy between condition and warranty in respect of all contractual descriptive statements. The descriptive statement must be a part or a term of the contract as opposed to a mere representation. Once it is accepted as a term, the next relevant question to be asked is, is it within the "description" as in section 13? Description under section 13 only refers to a descriptive statement which

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<sup>7</sup> Id. p. 516.

<sup>8</sup> [1902] 2 IR 585, at p. 631.



goes to identify the goods and as such is a condition. Any other statement which does not identify the goods may be regarded only as a warranty.<sup>9</sup>

In *T.J. Harrison v. Knowles & Forster* (1918)<sup>10</sup> the defendants wanted to sell ships. They delivered to the plaintiffs certain particulars which stated, inter alia, that the ships were of dead-weight capacity of 460 tons each. There was a provision that the defendants were not to be "accountable for errors in description". The plaintiffs relied on these particulars about the ships and bought them, only later to discover that their dead-weight capacity was merely 360 tons each. The plaintiffs brought an action to recover damages for:-

- (i) breach of condition and/or
- (ii) breach of warranty.

The court held that the misstatement of the dead-weight capacity amounted to a breach of warranty and not a breach of a condition because the goods were specific existing chattels. Since it was a warranty, the provision for exemption would be operative to protect the defendants from liability and as such the plaintiffs' action for warranty failed. Bailache J. in his judgement said:-

"If the subject-matter of the contract is a specific existing chattel, a representation as to some quality attached to it or possessed by it is

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<sup>9</sup> See Atiyah, *Sale of Goods*, p. 131.

<sup>10</sup> [1918] KB 608.

only a warranty unless the absence of that quality or the possession of it in a less degree makes the thing essentially different from that described in the contract. Applying this principle here, and making, I hope, full allowance for the importance of the statement about the dead-weight and the serious discrepancy between the statement and the true fact, it seems to me that the difference is essentially one of degree and not of kind, and that the statement as to dead-weight capacity was a warranty and not a condition."

The judge relied on the case of *Barr v. Gibson* (1838)<sup>11</sup> and he distinguished the case of *Varley v. Whipp* (1900).<sup>12</sup> The same approach as in the case of *T.J. Harrison* was used by Salmond J. in the New Zealand case of *Taylor v. Combined Buyers Ltd.* (1924).<sup>13</sup> The plaintiff bought from the defendant a "new Calthorpe car" which he found not to be so after using it for over three months. His action against the defendant was for rescission or damages for:-

- (i) fraudulent misrepresentation and/or
- (ii) breach of implied condition of merchantable quality and fitness for purpose.

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<sup>11</sup> 3 M & W 390, 7 L.J. Ex. 124.

<sup>12</sup> [1900] 1 QB 513.

<sup>13</sup> [1924] Gaz. L.R. 60.

One of the issues before the court was whether this was a sale by description, for the purpose of establishing merchantability. Salmond J. held that:-

"..... the sale of a specific article is a sale by description .... in so far, but so far only, as the article is expressly sold as being of a certain kind, class or species; but .... statements made as to the quality or other unessential attributes of the article sold are not parts of the description, but are merely representations and inoperative unless fraudulent or unless on the true construction of the contract, in accordance with the express terms of any necessary implication there from, these statements amount to an express warranty or condition."

Thus, summarily, the descriptive statement in a sale of a specific goods must be incorporated into the contract and it must refer to the identity of the goods. Then only will the statement be considered as a "description" within section 13. If the statement refers to anything less than the identity of the goods it will only be a warranty as opposed to a condition.<sup>14</sup> In sale of unascertained goods the descriptive statement would naturally refer to the identity of the goods because it is used to define and identify them for purposes of the contract.

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<sup>14</sup> This problem will be dealt with again in part (b).

In Scotland, when dealing with the problems of sale by description, the first thing to decide is whether the statement communicated to the buyer during the pre-contractual negotiation amount to a term of the contract or a representation or a mere puffery or trade gimmick. If it is a term or a representation, then it has a legal effect, unless if it is just a puff or gimmick. If the statement is a term, breach of that term means breach of contract. But if the statement is a representation, if it is not true, then it renders the contract void or voidable. Intention of the parties is the means of proving the status of a statement. Usually this will be decided based on certain factors, i.e.:-

- (1) Whether the statement is made with or without obligation or warranty.
- (2) what was the content of the statement; was it in reference to something collateral or something as to the state of the subject of the contract?
- (3) The stage of the contract at which the statement is made.
- (4) Whether the oral statement is reduced into writing.
- (5) Whether one party had expert or professional knowledge of the subject-matter of the contract.<sup>15</sup>

After it has been decided that it is a term, the next thing to consider is, whether it is a material term so as to justify rescission or a non-material term which only gives rise to a claim of damages. For this purpose reference is made to the intention of the parties, based on a few guidelines. These are: the commercial importance of the term to the party

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<sup>15</sup> Walker, *The Law of Contracts and Related Obligations in Scotland*, 2<sup>nd</sup> Ed., 1985, p. 339.

prejudiced by the breach; whether it goes to the root of the contract and affect the fundamentals of the contract; and whether the defect which has emerged has allowed substantial performance of the contract or has in fact prevented it.<sup>16</sup>

Another problem which resulted in the extension of the concept of description is that quality and fitness would seem to be redundant. Since almost all sales are sales by description, it would be better to rely on section 13, where the only requirement is to show that the sale is by description. And the court in such case would make liability strict. The strict attitude of the court can be seen in the cases of *Arcos Ltd. v. E.A. Ronaasen & Son* (1933)<sup>17</sup> and *Re Moore & Co. Ltd. and Landauer & Co. Ltd.* (1921).<sup>18</sup> In the former case, the buyer agreed to buy a quantity of staves which they required, as the sellers knew, for making cement barrels. With respect to the length, breadth and thickness the agreement contained stipulations which allowed some variation in the length and breadth of the staves, but none in thickness which was specified to be half an inch. When the staves were delivered, only five percent conformed with the description but the rest were nearly all less than 9/16 of an inch. It was found as of fact that the goods were "commercially within and merchantable under the contract specification, and also they were reasonably fit for the purpose for which they were required". However, despite

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<sup>16</sup> Id. p. 341.

<sup>17</sup> [1933] AC 470.

<sup>18</sup> [1921] 2 KB 519.

these findings the court held that the buyers were entitled to reject the staves as they did not conform to description.

In the case of *Re Moore* the mode of packing was treated as part of the description by which the goods had been sold. The buyers in this case had agreed to buy 3000 tins of Australian canned fruits to be packed in cases of 30 tins each. When they were delivered, it was discovered that some of the boxes contained only 24 tins although the total amount delivered was correct. The court held the buyer was entitled to reject. There was nothing to suggest that the merchantability or fitness of the goods were affected; nevertheless, there was a breach of section 13. Another point to note is that it is difficult to reconcile how a failure to perform an express term, pertaining to the packing, could be a breach of an implied term of description.

Section 13 imposes a strict liability upon the seller. In *Shepherd v. Kain* (1821)<sup>19</sup> a specific ship was sold as copper-fastened when in fact it was only partially so. There was a provision that "the vessel, with her stores, as she now lies, to be taken with all faults, without allowance for any defects whatsoever". The court held that although it was part of the contract that the ship should be taken "with all faults", they should be construed to mean all faults consistent with the advertisement.

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<sup>19</sup> 5 B Ald. 240.



The courts became too liberal in their interpretation of sale by description. The implied term was initially created for the purpose of providing some form of protection to a buyer who had not seen the goods. But this protection has been misused and taken advantage of, for example, where the buyer may seek to reject the goods tendered by alleging non-conformity with description, when in reality the true reason is a decline in the market or that it is no longer beneficial for the buyer to continue with the contract.<sup>20</sup> But despite these problems, the court never ceased to extend the *Varley v. Whipp* doctrine. Lord Wright in *Grant v. Australian Knitting Mill Ltd.* [1936]<sup>21</sup> stated that :-

"...it may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter; a thing is sold by description though it is specific, so long as it is sold not merely as a thing corresponding to a description, example woolen undergarments, a hot water bottle, a second-hand reaping machine, to select a few illustrations."

In *Beale v. Taylor* (1967)<sup>22</sup> the seller advertised his car for sale as a "Herald, convertible, white, 1961". The buyer answered the advertisement, and examined the car and saw a "1200" disc at the rear of the car and bought it. The car turned out to be made

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<sup>20</sup> *Arcos Ltd. v. E.A. Ronaasen & Son* [1933] AC 470; *Re Moore & Co. Ltd and andauer & Co. Ltd.* [1921] 2 KB 519.

<sup>21</sup> [1936] AC 85, at p. 100.

<sup>22</sup> [1967] 1 WLR 1193.

of two parts; the rear half was of a 1961 model and the front part was of an earlier model. The Court of Appeal held that the words "1961 Herald" were part of the contractual description. The combined effect of the advertisement and the disc was that the seller was offering to sell a 1961 Herald and the buyer was relying on that description to make his judgment about the car.

Lord Wilberforce in *Reardon Smith Lines v. Hansen Tangen* (1976)<sup>23</sup> criticised this liberal attitude of the courts. This case involved ship builders who contracted to build a vessel to a certain specification at Yard No. 354 at Osaka. But because of its size it had to be built at Oshima at Yard No. 004. By the time the vessel was ready for delivery in 1974, the market had collapsed due to oil crisis. The charterers sought to escape from their obligation by rejecting the vessel on the ground, by analogy, with the contract for sale of goods, that the vessel tendered did not correspond with the description in that it was Oshima 004 and not Osaka 354. Their Lordships agreed that the authority as to "description" in sale of goods cases was not to be extended or applied to contracts of the present nature. However, Lord Wilberforce did discuss the issue of description. He drew a distinction between the use of the words "identity" and "identification". Words read in the first sense would mean that each element in them has to be given contractual force because their purpose is to state (identify) an essential part of the description of the goods. In the second sense the purpose is merely to provide one party with a specific indication

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<sup>23</sup> [1976] 1 WLR 989.

(identification) of the goods so that he can find them.<sup>24</sup> He dismissed the decisions in earlier cases as being excessively technical.

There is a legal maxim which says **de minimis non curat lex** which means the law does not concern itself with trifles. Sale by description is made subject to this rule to disallow repudiation on grounds of slight disconformity, as in the case of *Re Moore*. But since description is an express term, breach of it, no matter how trifling, entitles the buyer to some kind of damages. So, sale by description is actually a double-edged sword which cuts on both sides. If the buyer could not succeed under section 13, because the description is not of identity but quality, he can claim for breach of the express term. Whatever remedy that he will be awarded will depend on the consequences of the breach.

As mentioned earlier, in a sale by description merchantable quality was implied. So, what is the relationship between description (section 13) and quality (section 14(2))? Section 13 covered a different scope from that of section 14(2). Section 13 applied to cases where goods do not correspond to their description while section 14(2) was limited to cases where goods tendered do correspond with their description but are damaged to some extent or defective in quality. In the Scottish case of *M'Callum v. Mason* (1956)<sup>25</sup> the buyer, a nursery man, bought from the seller, a manufacturer, a quantity of a proprietary fertiliser to which a percentage of magnesium sulphate was to be added. This

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<sup>24</sup> Id. p. 999.

<sup>25</sup> 1956 SC 50.

mixture was recommended to him by the seller for application to his tomato crop as a remedy for soil deficiency. When the mixture was applied to the tomato plants, they died. The mixture was again applied to the next year's crop, which also died. When analysed, the mixture was found to contain sodium chlorate, which was poisonous to plants. The buyer brought action for breach of section 14(1) and (2) of the Sale of Goods Act 1893, alleging that the seller had failed to supply goods which were of merchantable quality. It was held that the buyer did not get what he had ordered. Section 14(2) was irrelevant since the implied condition that goods must be of merchantable quality did not apply to goods which were of a different description from those purchased. Lord Justice Clerk (Thomson) made a distinction between the two sections and said:-

"The scope of this subsection (section 14(2)) is, however, limited to the case where the goods tendered are damaged to some extent or are defective in quality but not so much that they can no longer be said to correspond with the description. The buyer gets goods of the sort described in the contract but they are for some reason or another, sub-standard. In section 13 the goods are not what was ordered; in section 14(2) the buyer gets the kind of goods he ordered but they are defective. It seems to me therefore that, where, as here, the buyer says that having ordered fertiliser he got weed-killer, he is far from section 14(2). Section 14(2) operates where what he got is still capable of being described as fertiliser but on account of some defects it is not of

such quality as a reasonable buyer would regard as satisfying the contract, assuming him to be aware of the true facts."<sup>26</sup>

#### **(b) SECTION 13 OF THE 1979 ACT**

From the evolution of the cases during the early twentieth century, sale by description did not only include sale of unascertained goods, but also sale of goods which were specific but were bought by description. One issue arises here, i.e., if description goes to identity, identifying the subject-matter of the contract, what would description mean in sale of specific goods (which are already agreed upon at the time of the contract)? It must be recognised that the identification function of "description" is not the same with specific goods as in unascertained goods. In sale of unascertained goods the description serves to identify the subject-matter of the contract, so that when the goods are delivered they answer to the contract description. In sale of specific goods description does not function to identify, but to delineate the fundamental obligation of the seller, i.e., to define the essence of what he is undertaking to deliver.<sup>27</sup> What it means is that description defines the essential characteristics which the subject-matter must possess if the seller is to fulfill his fundamental obligation.

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<sup>26</sup> Id. p. 56.

<sup>27</sup> Goode, *op. cit.*, p. 250.

The broad interpretation of sale by description was confirmed by the Supply of Goods (Implied Terms) Act 1973. Section 13 was amended by this Act, which added a new subsection (3) providing:-

"A sale of goods is not prevented from being a sale by description by reason only that, the goods being exposed for sale or hire, are selected by the buyer."

By this provision it is made clear that sale of specific goods can be regarded as sale by description, even though the buyer has the opportunity of inspecting and examining it. This subsection has been a far cry from the law as stated in early cases. In *Joseph Travers & Son s Ltd. v. Longel Ltd.* (1947)<sup>28</sup> Sellers J. accepted the following passage from *Benjamin's Sale of Personal Property*<sup>29</sup>:-

"Sale by description may ..... be divided into sales (1) of unascertained or future goods, as being of a certain kind or class, or to which otherwise a "description" in the contract is applied; (2) of specific goods, bought by the buyer in reliance, at least in part, upon the description given, or to be tacitly inferred from the circumstances, and which identifies the goods."<sup>30</sup>

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<sup>28</sup> (1947) 64 TLR 150.

<sup>29</sup> 7<sup>th</sup> ed., p. 641.

<sup>30</sup> Benjamin's Sale of Goods, op. cit., p. 451.



This Act also amended section 14(2), whereby the words "sale by description" were deleted. Now merchantable quality is implied in all sales where the seller deals in the course of business. In the Scottish case of *Border Harvesters Ltd. v. Edwards Engineering (Perth) Ltd.* (1985)<sup>31</sup> there was a written contract for sale of a machine for drying grain known as Kamas Flakt Continuous Flow Tower Dryer. In the contract there was an express term that the machine was of a certain basic capacity for drying grain. There were other terms in the contract which basically limited or excluded the seller's liability in respect of the goods sold. The buyer built his case on section 17 and section 20 of the Unfair Contract Terms Act 1977<sup>32</sup> with regard to the contractual terms. In considering section 20, two points arose:-

- (1) Whether the sale was by description within the meaning of section 13 of the Sale of Goods Act 1979;
- (2) Whether it was a contract to which section 14 applied.

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<sup>31</sup> 1985 SLT 128.

<sup>32</sup> Unfair contract Terms Act 1977:

Section 17:- "Any term of a contract which a consumer contract or a standard form contract shall have no effect for the purpose of enabling a party to a contract – (a) who is in breach of a contractual obligation, to exclude or restrict any liability of his to the consumer or customer in respect of the breach ... if it was not fair and reasonable to incorporate the term in the contract..."

Section 20(2):- "Any term of a contract which purports to exclude or restrict liability for breach of the obligations arising from – (a) section 13, 14 or 15 of the said Act of 1979 (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose) ... shall ... (ii) have no effect if it was not fair and reasonable to incorporate the term in the contract."

As to the first point, the buyers argued that the equipment was described as having a certain performance capacity and was therefore a sale by description within the meaning of section 13. His Lordship disagreed and held that "what was contracted for in this case was described as a Kamas Dryer, and what was supplied was a Kamas Dryer. What the dryer was capable of doing was in my judgment not part of the description of the goods supplied."<sup>33</sup> He quoted Lord Dunedin's judgment in *Manchester Liners Ltd. v. Rea Ltd.* (1922)<sup>34</sup> who made a distinction between description of goods and their quality. He said:-

"The tender of anything that does not tally with the specified description is not compliance with the contract. But when the article tendered does comply with this specific description, and the objection on the buyer's part is an objection to quality alone, then I think section 14(2) settles the standard, and the only standard by which the matter is to be judged."

Thus, statement about capacity is not description under section 13 but goes to the quality of the goods and is dealt with under section 14(2).

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<sup>33</sup> 1985 SLT 128, at p. 131.

<sup>34</sup> [1922] 2 AC 74.

## **(II) ELEMENTS OF SECTION 13 SALE OF GOODS ACT 1979**

Before section 13(1) can be successfully invoked, the buyer has got to establish all the elements of the section, and they are:-

- (a) The words are descriptive of identity rather than attributes;
- (b) They are terms of the contract; and
- (c) Sale was made because of reliance on the description.

### **(a) WHAT AMOUNTS TO DESCRIPTION**

To describe is to set forth in words or to recite the characteristic of something.<sup>35</sup> Reference to identity and characteristics of goods is a description of them. Description is necessary to define contract goods which are not present or not in existence, so that one may know what the seller is to deliver and what the buyer is to receive.<sup>36</sup> Goods which are not present or unascertained can be defined in various ways.<sup>37</sup>

- (1) By enumeration of qualities and reference to quantity. Example, 27 1/2 quarters of seeds described as common English sainfoin.<sup>38</sup>
- (2) By reference to the position of the goods in time and space. Example, goods "afloat per SS Morton Bay due London approximately June 8th."<sup>39</sup>

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<sup>35</sup> Oxford Dictionary of Current English, 7<sup>th</sup>. Ed., 1984.

<sup>36</sup> "Identity" is also important in the definition of specific goods. Section 61 defines specific goods as goods which are identified and agree upon at the time of the contract of sale."

<sup>37</sup> Montrose, op. cit. p. 763.

<sup>38</sup> *Wallis Son & Wells v. Pratt & Haynes* [1911] AC 394.

<sup>39</sup> *MacPherson Train & Co. v. Howard Ross & Co.* [1955] 1 WLR 640.

- (3) By combined reference of spatio-temporal factors with quality. Example, "the black horse in the last stall in my stable."<sup>40</sup>
- (4) By combined reference of spatio-temporal factors with quantity. Example, 100 quarters of wheat ex SS Mary.

These modes of definition are the result of description. By describing the quality, quantity and their whereabouts, the goods can be sufficiently defined and identified as the contract goods. What matters in the description is the substantial ingredient of the identity of the thing as to its kind, class or genus as contrasted with its attributes.

#### **(i) Identity and Attributes**

From the foregoing it can be seen that descriptive words are employed to define and identify the subject-matter of the contract and they are relied upon by the buyer for that purpose, especially when the goods are not yet in existence or present. The difficulty, however, remains as to how to determine what are the parts of the descriptive words which are so crucial to the identity of the subject-matter that their absence would make what was tendered essentially different from what was bargained for. According to Scott L.J. "as a matter of law ..... every item in a description which constitutes a substantial ingredient in the "identity" of the thing sold is a condition."<sup>41</sup> The most important element in the description is the substantial ingredient in the identity of the goods and not mere

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<sup>40</sup> Example given by Channel J. in *Varley v. Whipp*.

<sup>41</sup> *Couchman v, Hill* [1947] KB 554, at p. 559.

attributes of them. What then is the difference between identity and attribute and, if there is a difference, what is the test to distinguish between them? *The Oxford English Dictionary* states that identity means the condition of being specified, and attribute means quality ascribed to a person or thing.<sup>42</sup> The descriptive statement made about goods will only form part of the description if it has been used to identify the goods. This test was laid down by the cases in the 1950s and 1960s in line with the development of the theory of fundamental breach. The theory of fundamental breach provides that a party could not deny liability by relying on an exemption clause if he was guilty of a fundamental breach of contract. However, it should be noted that this theory is short-lived, is discredited in England and never existed in Scotland. Under this principle, a seller is in fundamental breach of his contract if he delivered goods "different in kind" from those contracted for.<sup>43</sup> This test was reaffirmed in the case of *Ashington Piggeries Ltd. v. Christopher Hill Ltd.* (1972)<sup>44</sup>

In the *Ashington Piggeries Case*, there were two contracts. The first was between the plaintiffs and the defendants whereby the plaintiffs agreed to supply the defendants, mink-breeders, with feeding stuff compounded in accordance with a formula which had been drawn up by the defendants in consultation with the plaintiffs. The formula included a

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<sup>42</sup> Oxford dictionary of Current English, 7<sup>th</sup>. Ed. 1984.

<sup>43</sup> Brian Coote, "Correspondence with Description in the Law of Sale of Goods", *Australian Law Journal*, vol. 50, 1976, p. 17, at p. 20.

<sup>44</sup> [1972] AC 441.

proportion of "herring meal" and this expression was the only relevant description. The second contract was between a third party (a Norwegian Company) and the plaintiffs, whereby the third party was to supply Norwegian herring meal to the plaintiffs. This contract was more detailed and had an exemption clause. When the herring meal was mixed into the compound it proved fatal to the mink. The reason was that sodium nitrate, a preservative present in some of the herring meal set-off a reaction which produced DMNA, which was highly toxic to mink.

On the issue of whether there was a breach of section 13, the majority of the House of Lords held that the meal was still herring meal. Lord Hodson and Lord Guest held that nothing external which was poisonous had been added to the herring meal. It was still herring meal despite being contaminated.<sup>45</sup> Lord Diplock held that the test is "whether the buyer could fairly and reasonably refuse to accept the physical goods proferred to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them goods of a different kind from those he had agreed to buy. The key to section 13 is identification."<sup>46</sup> And accordingly he held that the reaction of the preservative with the herring meal affected the quality but not the identity of the goods. Lord Wilberforce suggested a broader, more common sense, test of description, i.e. a test of a mercantile character.<sup>47</sup> He said that buyers and sellers and arbitrators in the market,

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<sup>45</sup> Id. p. 467-472.

<sup>46</sup> Id. p. 504.

<sup>47</sup> Id. p. 489.



asked what this was, could only have said that the relevant ingredient was herring meal and, therefore, that there was no failure to correspond with description.<sup>48</sup> Viscount Dilhorne was the only one of their Lordships who held that there was a breach of section 13. He said that although in many cases it was difficult to draw a line between a difference in quality and a difference in kind, here, where the distinction was between poisonous and non-poisonous herring meal, there was not merely a difference in quality but in kind.<sup>49</sup>

The majority of their Lordships distinguished the case of *Pinnock Brothers v. Lewis & Peat Ltd.* (1923)<sup>50</sup> This case concerned the sale of East African copra cake. The goods were found to contain castor oil which caused them to be poisonous to cattle. It was held that the goods did not correspond to their description, i.e. as copra cake. In the *Pinnock Brothers Case*, something external was added to the copra cake so as to make it of a different kind. In the instant case, DMNA was not something added to the herring meal. It was contaminated but no poison was added to it to make the description "herring meal" erroneous.<sup>51</sup> It was still "herring meal" though gone bad.

As regards the second contract of sale between the respondents and the third party, this was in writing and there was a clause headed "Quantity and Description". The herring

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<sup>48</sup> Ibid.

<sup>49</sup> id. p. 484-485.

<sup>50</sup> [1923] 1 KB 690.

<sup>51</sup> Lord Hodson, id. p. 467.

meal spoken of was of "Norwegian Herring Meal fair and average quality of the season"; this was followed by the ingredients which the meal was supposed to contain. Their Lordships held that the contractual description did not extend beyond the phrase "Norwegian Herring Meal". Neither the ingredients nor the "fair average" clause were part of the description. Description under section 13 refers to identification, therefore, only to so much of the contractual description as is required to identify the goods.<sup>52</sup> According to Coote, identification is a process of describing goods which are already in existence and it is a concrete process, for example, "this book in my hand". The goods are being ascertained by being identified. On the other hand, if the goods are not in existence, they have to be defined by setting out the characteristics they will possess. And in this case it was not necessary for their Lordships to have recourse to identification or difference in kind. Since the goods were future goods, it was more appropriate to apply description in its full force; i.e., that every definition is a part of the description which has to be complied with. There was no need to refer to the abstract notion of identity and attributes.<sup>53</sup>

Since *Ashington Piggeries*, it has been the law that, if the goods tendered are different in kind rather than quality, then they fail to answer or conform with their description. And the test whether it is of a difference in kind is a common sense test of a mercantile character. "The question whether that is what the buyer bargained for has to be answered

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<sup>52</sup> Patient, "Ruminating on Mink Food", *Modern Law Review*, 1971, p. 557.

<sup>53</sup> Coote, *op. cit.*, p. 18.

according to such tests as men in the market would apply, leaving more delicate questions of condition, or quality, to be determined under other clauses of the contract or sections of the Act."<sup>54</sup>

In *Gill & Duffus v. Berger & Co. Inc.* (1984)<sup>55</sup> the sellers sold to the buyers 500 tonnes of Argentine Bolita beans, 1974 crop. It was provided for in the contract that the quality was to be "as per sample submitted to the buyers". There was also a term in the contract that a certificate must be issued by the General Superintendent Co. Ltd. to certify that quality at final port of discharge was equal to one of the sealed samples. On arrival of the goods at the port, a certificate was duly issued. When the beans were delivered, they were found to contain 1.8 per cent of coloured beans and Bolita beans are white. The buyers sought to reject the goods. It was held by the Court of Appeal that the beans did answer their contractual description and the mere presence of coloured beans did not make them of different in kind. Had the beans been substantially mixed with coloured ones, the General Superintendent Co. Ltd. would not have issued the certificate.

In the light of the *Ashington Piggeries Case*, it is clearly established that description refers to the identity of the goods rather than their quality. A question now arises: does this mean that quality is eliminated from the sale of future goods? This is not so because description of quality may not be deprived of all effects. It can be made and agreed upon

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<sup>54</sup> *Ashington Piggeries Ltd.*, per Lord Wilberforce p. 489.

<sup>55</sup> [1984] AC 382.

as an express promise as to description, or it can be an express or implied undertaking as to quality. Quality and description overlap significantly so much that breach by the seller will normally involve section 13 as well as section 14. Sometimes a description may carry an implication of quality. In a New Zealand case, *Cotter v. Luckie* (1918)<sup>56</sup> the buyer bought a bull described as a "pure bred polled Angus bull" from the seller. The seller was informed of the purpose for which the bull was required, namely for breeding purposes. The bull turned out to be physically abnormal and thus was prevented from breeding. The court held that the descriptive words were "meaningless unless intended to convey the impression that the animal might be used to get this class of stock". The sale was by description and that the description implied that the bull possess the quality of being capable of breeding.

On the other hand, in the case of *Border Harvesters Ltd. v. Edwards Engineering (Perth) Ltd.* (1985),<sup>57</sup> the judge did not think that quality could be used as part of the description. In this case there was a sale of a machine for drying grain and there was an express term as to its capacity. The court held that the capacity of the dryer was not part of its description but quality. Therefore, the sale was not one by description. It was for a specific type of dryer and one had been delivered. As to its capacity quality, since it was an express term, section 14(2) did not apply.

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<sup>56</sup> [1918] NZLR 811.

<sup>57</sup> 1985 SLT 128.

## **(b) TERM OF THE CONTRACT**

A sale is not necessary sale by description so as to invoke section into play merely because during the pre-contractual negotiations, descriptive words were used. And even if it is a sale by description, not all the descriptive words amount to "description" under section 13. To qualify as "description", the statements must form a term of the contract as opposed to mere puffery or representation. So, if there is a sale by description, we have to establish whether the descriptive words constitute a term of the contract or not.

To distinguish a term from a representation is a question of considerable difficulty, and drawing a line between the two is not easy. The cardinal rule is that the intention of the parties is important and should prevail. This intention can be inferred from the facts of the case and the relevant facts appropriate for consideration are:-

- (1) The time interval between the making of the statement and the final agreement.  
The shorter the time lapse, the more likely it is to be a term of the contract.
- (2) The importance of the statement to the parties. The more important the statement is, the more likely it is to be a term of the contract.
- (3) If the statement, made orally, become incorporated into the written agreement, it is a term of the contract.
- (4) If the maker of the statement is in a better position to ascertain the accuracy of the statement, then it will tend to be regarded as a term of the contract.<sup>58</sup>

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<sup>58</sup> Anson's Law on Contract, 26<sup>th</sup>. Ed. P. 111.

Even with such guidelines, it was still not any easier to say whether a description was a term of the contract or a representation. In some cases where the facts are similar, the decisions were conflicting and quite irreconcilable. In *Hopkins v. Tanqueray* (1854)<sup>59</sup> a statement made by the defendant about a horse which was offered for sale by auction was held to be a mere representation, not a term of the contract. Crowder J. said that the conversation was a mere representation and was evidently not made with an intention to warrant the horse. To constitute a warranty, a representation must be shown to have been intended to form part of the contract. In *Couchman v. Hill* (1947)<sup>60</sup> the defendant put up his heifer for auction. In the catalogue it was described as "unserved", but another statement added that the sale was "subject to the auctioneers' usual conditions" and that the auctioneer would not be responsible for any error in the catalogue. The "usual conditions" were exhibited at the auction and contained a clause that "the lots were sold with all faults, imperfections and errors of description". Before bidding, the plaintiff asked the auctioneer and the defendant if they could confirm that the heifer was "unserved" and to this they replied in the affirmative. On that assurance, the plaintiff bid and secured the heifer. The heifer later died. It was found out that it was in calf and it died because it was too young to carry a calf. The Court of Appeal held that the plaintiff was entitled to recover damages for breach of contract. The written document and the oral agreement formed a single and binding contract. The exemption clause was not applicable.

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<sup>59</sup> 918540 15 CB 130.

<sup>60</sup> [1947] KB 554.



In theory every contract is to be interpreted in the light of its own terms and the circumstances surrounding the case. From this developed the novel idea of "contractual intention" which had far-reaching implications because a transaction might be dealt with in accordance with rather an arbitrary and elusive canon of "intention". Secondly, this idea made useless the whole idea of law. The Sale of Goods Act implied various terms into the contract of sale, but these terms may be excluded or varied in accordance with the parties' express or implied intentions. If this is permitted and allowed to prevail in all circumstances without any safeguard, then the whole purpose of the law of implied warranty is defeated.

In *Bannerman v. White* (1861)<sup>61</sup> the contractual intention was made the vital test. The defendants bought from the plaintiff a large quantity of hops. Before the sale and during the course of negotiation, the defendants inquired whether sulphur had been used in the treatment of the hops. If that was so, the defendants would not even ask for the price. The plaintiff replied that no sulphur had been used. It was in fact used over five acres of the entire 300 acres of cultivation. The plaintiff had either forgotten or thought it was unimportant. After delivery the defendants refused to pay the price for which this action was brought. The court held that the plaintiff's assurance that sulphur was not used was the condition upon which the parties contracted. Erle C.J. in his judgement said that:-

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<sup>61</sup> (1861) 10 CBNS 844.

"....the defendants required and the plaintiff gave his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation; and if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted, and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used. The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded, or the sale maybe conditional to be null if the warranty is broken; and upon this statement of facts we think that the intention appears to have been that the contract should be null if sulphur had been used."<sup>62</sup>

From the above statement it would seem that even if delivery had been made and property had passed, this would have been unimportant but for the intention of the parties which may be elusive and unclear.

Sometimes there would be an intervening factor that can further aggravate the problem of ascertaining intention. That factor is error or mistake which will affect the consensuality of the contract because the parties may not agree on the same terms. For

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<sup>62</sup> Id. p. 860.

example the seller may make a promise in one sense and the buyer may understand it in another, and thus put a different interpretation on that promise. In *Smith v. Hughes* (1871)<sup>63</sup> a farmer sold certain oats to the buyer, a horse-trainer, by exhibiting a sample. The buyer intended to buy old oats to feed his racehorses but what was delivered was new oats. The seller knew they were new oats. The buyer rejected them but was refused by the seller who claimed for the price. The issue in this case was whether the subject-matter of the sale was described by the seller as "good oats" or "good old oats". The court was of the view that this was a crucial question and since it had not been put to the jury, a new trial was ordered. The evidence was not clear about whether the seller actually described the goods as "good oats" or "good old oats". The court made assumptions that if the seller had not used the word "old", what the buyer perceived would be crucial. If he realised that the seller had described them as "good oats", but he himself had mistakenly thought them to be old, the contract would still be valid because the mistake was unilateral or one-sided. But if he had mistakenly thought that the seller had described them as "good old oats", then the contract would be void because of the mistake as to the terms of the offer.<sup>64</sup>

The courts' attitude towards the idea of contractual intention seems to be to interpret a statement as a term of the contract rather than a mere representation, and this is especially so when the seller is a dealer in the goods. In *Dick Bentley (Productions) Ltd. v. Harold*

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<sup>63</sup> (1871) LR 6 QB 597.

<sup>64</sup> Macleod, *Consumer Sales Law*, p. 501.

*Smith (Motors) Ltd.* (1965)<sup>65</sup> a statement was made by a motor dealer that, based on the reading of the mileometer, the car had done only 20,000 miles when in actual fact it had done 100,000 miles. This was held to be a term of the contract. In contrast is the case of *Oscar Chess Ltd. v. Williams* (1957).<sup>66</sup> A private seller sold a car to a firm of dealers. He told them that the car was a 1948 model and the car log-book showed that it was first registered in 1948. The car was actually a 1938 model. The Court of Appeal held that the statement was a mere representation.

In the recent case of *Harlingdon & Leinster Ltd. v. Christopher Hull Fine Art Ltd.* (1990)<sup>67</sup> the sellers offered for sale two paintings which they described as being by Gabriele Munter. The buyers sent their employee to view the paintings and was told that the sellers knew little about the painting and about the artist. The painting was found to be a forgery and the buyers brought an action to claim for the return of the purchase price. At first instance the judge held that the buyer failed in his claim because they had not relied on the description of the painting as being by Gabriele Munter and therefore, there was no sale by description. The buyers appealed and on appeal it was held that the description of the painting as being by Gabriele Munter did not have sufficient influence on the sale for it to have been intended by the parties to become a term of the contract. The contract was thus not a contract for sale by description. The appeal was dismissed. Thus, in order for a

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<sup>65</sup> [1965] 1 WLR 623.

<sup>66</sup> [1957] 1 WLR 370.

<sup>67</sup> [1991] 1 All ER 737.

sale to be by description under section 13, the descriptive words must be relied upon to be a term of the contract and not a mere representation.

### **(c) RELIANCE ON THE DESCRIPTION**

It is a requirement that seller offers to sell by description and the buyer accepts to buy by description and there is a contract on those terms.<sup>68</sup> Thus, reliance on the description is an essential ingredient in the contract of sale by description. Reliance is not difficult to prove if the goods are unascertained. The buyer necessarily has to rely on their description because there is no other way that he could identify the goods.<sup>69</sup> In sale of specific goods, if they are ordinary articles of commerce the court will usually presume that the buyer intended to buy in reliance on the goods possessing the characteristics making up their description rather than purchasing a specific article as such. As in the case of *Grant v. Australian Knitting Mill* (1936)<sup>70</sup>, Lord Wright said that it is a sale by description even though the buyer is buying something displayed before him. A specific thing is sold by description if it is sold as a thing corresponding to it. Similarly, in the case of *Beale v. Taylor* (1967)<sup>71</sup> even though the car was a specific thing, it was bought by the buyer relying on the description of it in the advertisement.

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<sup>68</sup> Goode, op. cit., p. 253.

<sup>69</sup> Ibid.

<sup>70</sup> [1936] AC 85.

<sup>71</sup> [1967] 1 WLR 1193.

#### **(d) EXCLUSION OF SECTION 13**

The provisions in the Unfair Contract Terms Act 1977 clearly prohibit the exclusion or limitation of the seller's liability under sections 13 - 15 of the Sale of Goods Act. Section 6 of the Act provides that any such terms will be void as against a buyer who deals as a consumer, and in other cases will be subject to the reasonable test. Despite this prohibition, which is only apparent, sellers can still exclude or limit their liabilities towards the buyer. How they do it is, firstly, by preventing it from being a sale by description. In a sale of specific goods, the seller may use descriptive words about the goods, but at the same time requires the buyer to examine them, or he disclaims as to the correctness of the statement.<sup>72</sup>

Secondly, the seller can prevent the buyer from relying on any description. As in the case of *Harlingdon and Leinster* (1990)<sup>73</sup> the seller informed the buyer that he had no relevant expertise, as he (the buyer) had, in German expressionist painting. In this manner, the seller was able to contract out of section 13 by claiming not having the expertise.

Where it is reasonable to exclude section 13, in cases of non-consumer sale, its effect is minimal. Its exclusion merely negates the implied term of correspondence with description. There is still the express duty on the part of the seller to deliver goods

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<sup>72</sup> Atiyah, *Sale of Goods*, p. 220.

<sup>73</sup> [1990] 1 All ER 737.



conforming to the contract description. Negating this would mean negating the whole contract.<sup>74</sup>

### **(III) SALE BY DESCRIPTION UNDER OTHER STATUTES**

#### **(a) UNIFORM COMMERCIAL CODE**

In the United States of America, sales law is governed by Article 2 of the Uniform Commercial Code 1952. This Code was drafted by Karl Llewellyn and has been adopted by every state. The Code categorised warranties into two, i.e., express and implied warranties. By virtue of Article 2-313, it states that:-

"Express warranties are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model."

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<sup>74</sup> Goode, op. cit., p. 254.

Part (b) stipulates that any description of the goods, which forms part of the "basis of the bargain", creates an express warranty that the goods shall conform to the description. Although factual statement will create a warranty, a statement of the seller's opinion does not. The duty of the court is to decide whether the statement made is a fact or an opinion. In the case of *Royal Business Machines v. Lorraine Corp.* (1980)<sup>75</sup> the fact-opinion test was stated as:-

"The decisive test for whether a given representation is a warranty or merely an expression of the seller's opinion is whether the seller asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on a matter of which the seller has no special knowledge and on which the buyer may have expected also to have an opinion and to exercise his judgment .... General statements to the effect that goods are "the best" ... or are "of good quality" or will "last a lifetime" and be "in perfect condition" ... are generally regarded as expressions of the seller's opinion or "the puffing of his wares" and do not create an express warranty."

Once it is proven that the statement is a fact, then the next question to be asked is, does the statement form "the basis of the bargain"? What does this phrase mean? It is said that this is a murky concept but it is very much like reliance.<sup>76</sup> If the buyer relies on

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<sup>75</sup> 633 F.2d 34 (1980).

<sup>76</sup> Dunfree, T.W., et. al., **Modern Business Law**, 1984, p. 407.

the seller's description of the goods, and that description is not a mere puffery, there is an express warranty that the goods will correspond with their description. The basis for liability is the reliance by the buyer on the words of the seller. But in the case of *Ewers v. Eisenzopf* (1979),<sup>77</sup> it was held that the seller's affirmation must have been only a contributing factor in the buyer's decision to purchase. What happened in this case was, Ewers owned a saltwater aquarium with tropical fish. He bought some seashells, a piece of coral and a driftwood branch from Eisenzopf's shop. Although the shop sold these items, it did not specialise in aquariums or water life Ewers asked the sales clerk whether the items bought would be suitable in a saltwater aquarium. He replied that they "were suitable for saltwater aquariums, if they were rinsed". Ewers took the items home and rinsed them for twenty minutes before putting in his aquarium. Within one week, seventeen of his tropical fish died due to pollution from the toxic matter released from the decay of the once-living creatures contained in the shells. Preventing such pollution would need a week long soaking in boiling water. Ewers sued Eisenzopf for breach of express warranty but it was held in the lower courts that; (1) the clerk's statement was too indefinite to constitute an express warranty and, (2) even if there was an express warranty, it was not breached, since the proper method for cleaning the items was "little more than an extended rinsing or soaking". On appeal to the Supreme Court, it was held that, Article 2-313 does not require the words "warrant" or "guarantee" to establish an express warranty. A buyer has the burden of proving the purchase was consummated on the basis of factual representations regarding the title, character, quantity, quality, identity

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<sup>77</sup> 276 N.W.2d. 802 (Wis. Sup Ct. 1979).

or condition of the goods. In this instance, there was an express warranty. Secondly, on whether the express warranty was the "basis of the bargain", the court held that it was not necessary that the affirmation be the sole basis for the sale, it would be sufficient if it is a factor in the purchase.

Thus, from the above case it seems that there is no necessity that the seller should use any formal words to create a warranty, or even intend to create a warranty. By simply describing the goods, the seller warrants that they will meet their description.

Goods may be described by way of advertisements. If the advertisements are meant to induce sales, they can amount to express warranties. In the case of *Keith v Buchanan* (1985)<sup>78</sup> the plaintiff bought a sailboat from the defendant for the price of US\$75,610. In the advertisement about the boat, it was described as a "picture of sure-footed seaworthiness". In another brochure, the same boat was called, "a carefully well-equipped, and very seaworthy live-aboard vessel". The plaintiff bought the boat relying on the advertisements. After the delivery of the boat was made, a dispute arose whereupon the plaintiff brought action against the defendant for breach of the express warranty. In the first instance, the trial judge held in favour of the defendant in that there was no express warranty as there was undertaking in writing by the defendant to preserve or maintain the utility or performance of the vessel. The plaintiff appealed against this

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<sup>78</sup> 1985 173 Cal. App. 3d. 13. 220.

decision and on appeal it was held by the court that statements made by a manufacturer or retailer in an advertising brochure which is disseminated to the consuming public in order to induce sales can create express warranties. The statements in the brochure are specific and unequivocal in asserting that the vessel was seaworthy and therefore they were affirmations of fact relating to the quality or condition of the vessel. The court held further that the affirmation had form part of the basis of the bargain as the plaintiff had expressed to the defendant of his desire for a long distance ocean-going vessel.

An important distinction can be made between the English law and the American law regarding warranty of description. In England, compliance with description is an implied warranty whereas in America, it is an express warranty. This is obvious because description is an express term. I am of the opinion that the American approach should be more appropriate because it saves the trouble of having to imply something which is already expressed.

#### **(b) VIENNA CONVENTION ON INTERNATIONAL SALE OF GOODS**

This Convention consists of statutory rules on the international sale of goods which are contained in an international treaty. These rules, like the other statutes on this subject, are supplementary to the parties' agreement. It is the contract that is the principal source of the seller's obligations. Article 35 of the Convention presents a unified approach to the seller's contractual obligations with respect to the goods. Article 35(1) provides:-

“ The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.”

Article 35 provides a simple and comprehensive text. Paragraph (1) emphasises the rule of compliance with the contract, i.e., the seller must deliver goods conforming to the contract, not only in quantity, quality and description, but also in which they are contained and packaged. All these factors are usually expressed in the terms of the contract and the duty of the seller is to deliver goods in accordance with what they have agreed. The seller's duty is to deliver goods contained or packaged in the usual manner or, where there is no such manner, in a manner adequate to preserve and protect the goods.<sup>79</sup>

The description of the goods may be made by the seller in his offer, in the form of an advertisement illustrating the goods and their qualities, is binding on him. The request may also be made by the buyer as to the description of the goods. If the seller does not raise any objections, the delivered goods must be as required by the buyer.<sup>80</sup> There is a breach of contract when goods delivered do not conform to the contractual terms.

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<sup>79</sup> Bianca & Bonell, **Commentary on the International Sale of Goods, the 1980 Vienna Sales Convention**, 1987, p. 269.

<sup>80</sup> *Id.* p. 273.



From the foregoing it is submitted that under the Vienna Convention, as under the Uniform Commercial Code, warranty of description is an express term. It is clear from the reading of Article 35 that the obligation of the seller in relation to the description and other particulars of the goods is to deliver them as required under the contract. Therefore, the obligation of the seller is based on what had been expressly agreed between the seller and the buyer. Article merely emphasises that the seller is bound to comply with the contract. I opine that this approach is also appropriate as it recognises what is obvious.

#### **(IV) CONCLUSION**

Although section 13 is not free from any criticisms, it has caused little difficulty in practice. It has served as a valuable means of protection to the buyer. Section 13 still retains its original wording, except with the addition of subsection 3, which was added by the Supply of Goods (Implied Terms) Act 1973. This amendment was based on the proposals made by the Law Commissions in their 1969 report on the amendments to the Sale of Goods Act 1893.<sup>81</sup> Subsection 3 extended the meaning of sale by description to include sale of goods selected by the buyer. So, if a buyer buys specific goods but he buys it relying on the description of them, it is a sale by description. So, it can be said that there can be no sale other than sale by description.

In a sale by description, there is an implied term of merchantable quality. Since there is no sale but sale by description, it is no longer necessary to have the words "sale by

description" in section 14(2). Therefore, they were deleted from the section by the 1973 Act. Now, merchantable quality is implied in all sales, except where the buyer is buying something which he has examined. Here, he is buying a specific goods as such.

The relevant provisions in the 1973 Act were incorporated into the 1979 Sale of Goods Act without any further amendments. The same provision in section 13 was enacted in the Supply of Goods and Services Act 1982, in relation to transactions other than sale and hire-purchase. This Act was made applicable to Scotland by the recent Sale and Supply of Goods Act 1994. The incorporation of section 13 into these Act were made without any changes in its form or wordings. This goes to show that section 13 is not a problem section.

Between the Sale of Goods Act 1979, the Uniform Commercial Code and the provisions in the Vienna Convention on the International Sale of Goods, the difference is that, the English law implied condition of description, while in the other two, description is an express warranty. Besides this difference, they are similar in application. They all specify the duty of the seller to deliver goods as agreed under the contract.

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<sup>81</sup> Law Commissions Report no. 24, 1969 on Amendments to the Sale of Goods Act 1893.

## **CHAPTER FOUR**

### **UNDERTAKING OF MERCHANTABLE QUALITY**

#### **INTRODUCTION**

The undertaking of merchantable quality is implied under Section 14(2) of the Sale of Goods Act 1979. According to Atiyah, the implied condition of merchantable quality is in many respects the most important part of the law of sale because it is the foundation of the seller's obligation as to the quality of the goods, which is the very essence of the law of sale.<sup>1</sup> In this chapter, I will discuss:- first, the background to the implied term of merchantable quality. This consists of a discussion of the former section 14(2), the problems faced by the court in defining merchantable quality and how this was solved by the 1973 Act and incorporated into the Sale of Goods Act 1979. Second, I will discuss the statutory meaning of merchantable quality in subsection (6) and the recent re-definition of the phrase in the 1994 amendment. Third, I will discuss the elements and the exceptions under section 14(2). The elements that the buyer has to prove are, the seller sells in the course of business and the goods are supplied under the contract. The seller will not be liable if the defects are specifically drawn to the buyer's attention or if he has examined the goods. Finally, in conclusion, we will see whether it was necessary to re-define merchantable quality when the courts have already indicated this change in the decided cases.

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<sup>1</sup> Atiyah, *Sale of Goods*, 8<sup>th</sup>. Ed. P. 142.

## **(I) BACKGROUND TO MERCHANTABLE QUALITY**

### **(a) SECTION 14(2)**

In section 14(2) of the Sale of Goods Act 1893, merchantable quality was only implied in sale by description.<sup>2</sup> The two almost always run together. But the difficulty was as to whether the meaning of "sale by description" in section 14(2) was the same as in section 13. Another issue was whether the seller could be said to deal in goods of a particular description if he had never previously dealt in goods of that precise description before. As to the first issue, according to Lord Diplock in *Ashington Piggeries Ltd. v. Christopher Hill Ltd.* (1972),<sup>3</sup> description in section 13 is confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied, since sale of this kind is usually of unascertained goods. Under section 14(2), description was a means by which the buyer made known to the seller a range of purposes for which the goods were required.<sup>4</sup>

The old provision also required that the seller "deals in goods of that description". This phrase implied that the seller must be in the business of selling goods such as that sold. Could the seller be said to "deal in goods of that description" if he had never dealt with goods of that contractual description before, but had dealt with something of its kind. The *Ashington Piggeries case*, where although the sellers had never

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<sup>2</sup> See chapter 5.

<sup>3</sup> [1972] AC 441.

<sup>4</sup> Ibid. Lord Diplock at p. 507.

compounded food for minks before, being animal food compounders, they had dealt with animal feeding stuffs, is an example of the problem. Could they be said to "deal in goods of that description"? The majority of the House of Lords held that it was sufficient if the seller dealt in goods of that kind.<sup>5</sup>

The above problems were solved when the Supply of Goods (Implied Terms) Act 1973 made some amendments to the section. These amendments were incorporated into the Sale of Goods Act 1979. First, the Act deleted the phrase "sale by description" found in the subsection, second, it replaced the phrase, "seller who deals in goods of that description", with the phrase, "the seller sells goods in the course of a business". The new provision is wider than the original one because it applies to all business sales. In *Buchanan-Jardine v. Hamilink* (1981)<sup>6</sup> the seller of a farm and its live and dead stock brought an action against the buyer for payment of the balance of the price. The buyer counterclaimed that the goods bought were not merchantable because shortly after the sale there was a "stop notice" was issued by the health authorities because one of the cows belonging to the seller was found to be a positive T.B reactor. The "stop notice" prevented resale of the animals and this it was contended, led to a breach of section 14(2). The seller argued that he could not be selling in the course of a business when he actually sold the business. But it was held by the Lord Ordinary that the words "in the course of a business" would include a displenishing sale.

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<sup>5</sup> Id. Lord Guest p. 474, Lord Dilhorne p. 485, Lord Wilberforce p. 495.

<sup>6</sup> 1981 SLT (Notes) p. 60.

Section 14(2) excludes from its ambit a private sale by an individual seller. In the case of *Beale v. Taylor* [1967]<sup>7</sup> where a private seller sold a second-hand car as a "1961 Herald", the buyer had in consequence no remedy under section 14 and was compelled to take action under section 13.

The 1893 Act made reference to "the goods" which was replaced by the phrase "the goods supplied under the contract". The new provision extended the requirement of merchantable quality to cover more than the mere goods. Protection would include the container in which the goods were supplied. In *Gedding v. Marsh* (1920)<sup>8</sup> it was held that the seller's obligations covered not only the goods which were the actual subject-matter of the sale but also the container in which the goods were contained. Even though the container was to be returned to the seller, that was immaterial. In another case, *Wilson v. Rickett Cockerell & Co. Ltd.* (1954)<sup>9</sup> the plaintiffs, a husband and wife, bought a ton of Coalite from the defendants who were coal merchants. The wife made up the fire with some of the Coalite and suddenly there was an explosion caused by the presence of an explosive in a piece of coal. It was held by the court that the consignment of Coalite was delivered as a whole and must be considered as a whole. The presence of that piece of coal containing explosive made the whole consignment unmerchantable. Denning L.J. said in his judgement that:-

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<sup>7</sup> [1976] 1 WLR 1193.

<sup>8</sup> [1920] 1 KB 668. The case involved section 14(3), formerly subsection (1).

<sup>9</sup> [1954] 1 QB 598; *Duke v. Jackson* (1921) SC 362.



"Goods supplied under a contract of sale" means the goods delivered in purported pursuance of the contract. The section applies to all goods so delivered, whether they conform to the contract or not: that is, in this case, to the whole consignment, including the offending piece, and not merely to the Coalite alone."<sup>10</sup>

The above case criticised the case of *Duke v. Jackson* (1921)<sup>11</sup> where the facts were similar. The buyer bought a bag of coal from the seller, a coal merchant, which contained a detonator. While the coal was being burned in a kitchen fire, it exploded, injuring the buyer. An action was brought against the seller exclusively on section 14(1). The court held that the buyer's action failed because the averments of the buyer did not set forth that there was any defect in the fitness of the coal supplied under the contract, but merely the presence of a foreign substance which was not a subject of the contract of sale. The decision of the court was rather surprising and was criticised by Evershed M.R. in *Wilson v. Rickett*. He said that the court "introduced too great a refinement into the pursuer's pleading".<sup>12</sup> The court had drawn a line between goods supplied under the contract, i.e. the coal, and goods which were outside the contract, i.e., the detonator. Since there was no complaint about the coal, they were therefore fit for their purpose. The detonator, which was foreign, was not governed by the contract. This reasoning is hard to swallow because the coal and the detonator should

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<sup>10</sup> Id. p. 607.

<sup>11</sup> 1921 SC 362.

<sup>12</sup> [1954] 1 QB 598, at p. 611.

be considered as a whole consignment of the "goods supplied under the contract of sale" in section 14.<sup>13</sup>

## **(b) COMMON LAW DEFINITION OF MERCHANTABLE QUALITY**

The Sale of Goods Acts 1893 did not give a definition of the term "merchantable quality". A definition was introduced by the Supply of Goods (Implied Terms) Act 1973. Prior to this statutory definition, there was a long list of cases which attempted to define this elusive term. According to Roskill L.J., the complications regarding the meaning of the word did not arise before 1893. The problems seem to have arisen because of the "gloss that lawyers in this century repeatedly sought to impose on this single and simple word by seeking to re-define it by use of phrases which raise as many if not more problems than they solve."<sup>14</sup> Basically, there were two approaches or tests of merchantability, namely, the test of "acceptability" and the test of "usability".

### **(i) "Acceptability Test"**

This was the test put forward by Farwell L.J. in the case of *Bristol Tramways, etc. v. Fiat Motors Ltd.* [1910].<sup>15</sup> This case involved a sale of a Fiat omnibus which was required by the buyer for the purpose of carrying passengers in Bristol. This purpose

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<sup>13</sup> See also *Aswan Engineering Establishment Co. v. Lupdine* [1987] 1 WLR 1 and *Wormel v. RHM Agriculture (East) Ltd.* [1987] 1 WLR 109.

<sup>14</sup> Roskill L.J. in *Cehave v. Bremer* [1976] QB 44.

<sup>15</sup> [1910] 2 KB 831, at p. 841.

was made known to the seller and the vehicle was inspected by the buyer. In this case his Lordship suggested that:-

"The phrase in section 14(2) is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again."

This test of acceptability was taken a step further by Dixon J. in *Grant v. Australian Knitting Mills Ltd.* (1933)<sup>16</sup> to include an element of price. According to him,

"The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist, and not being limited to their apparent condition, would buy them without abatement of the price .... and without special terms."<sup>17</sup>

The price of the goods is an important element for consideration because the price will generally reflect the quality of the goods. The higher the price, the better should be the quality; and the cheaper the price, the lower should be the quality expected. This is however, not a conclusive proof of merchantability. In *B.S. Brown & Son Ltd.*

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<sup>16</sup> (1933) 50 CLR 387.

<sup>17</sup> At p. 418.

v. *Craiks Ltd.* (1970)<sup>18</sup> the buyers bought some material from the sellers who were manufacturers. The buyers wanted them for dress-making, but this was not made known to the sellers, who thought that they were wanted for industrial purpose. The material which was bought for 36.25p per yard had to be sold for 30p per yard. The sellers claimed that the materials were not merchantable under section 14(2). The House of Lords rejected their claim and held that despite the discrepancy in the price, the goods were not unmerchantable. According to Lord Guest, what was said by Dixon J. in *Grant v. Australian Knitting Mill* could not be construed strictly. It could not be a requirement of merchantability that there should not be any abatement of price. Unless there is a substantial difference in the price, so as to show that the goods could only be sold at a "throw-away price", the goods would still be regarded as merchantable.<sup>19</sup> In this case the difference of the price was not so substantial as to indicate unmerchantability.

In contrast to the above case is an Australian decision in *H. Beecham & Co. Pty. Ltd. v. Francis Howard & Co. Pty. Ltd.* (1921)<sup>20</sup>. The buyers bought spruce timber from the sellers for making pianos. The timber was selected by the buyers themselves from the sellers' stock. Later, much of the timber was found to be affected by dry rot, which was not noticeable upon a reasonable external examination. The sellers argued that the timber was merchantable because it still could be used for making boxes,

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<sup>18</sup> [1970] 1 All ER 823.

<sup>19</sup> At p. 828.

<sup>20</sup> [1921] VLR 428.

which is one of the other purposes of spruce timber. The court held that the timber was not merchantable because the buyer paid 80 shillings per hundred feet, whereas spruce timber for making boxes only cost 30 shillings.

**(ii) "Usability Test" or "Fitness for Purpose Test"**

This test was propounded by Lord Wright in the case of *Cammell Laird & Co. Ltd. v. Manganese Bronze and Brass Ltd.* [1934].<sup>21</sup> He said:-

"What subsection (2) now means by "merchantable quality" is that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence was not saleable under that description."<sup>22</sup>

The test as laid down by Lord Wright was modified by Lord Reid in *Henry Kendall & Sons v. Lillico & Sons Ltd.* (1969).<sup>23</sup> According to him, the words "such goods" would grammatically refer to "the goods in the form in which they were tendered". But he (Lord Wright) could not have meant that. What he meant by "such goods" were goods which complied with the description in the contract under which they were sold.<sup>24</sup> Thus, his amended version was:-

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<sup>21</sup> [1934] AC 402 at p. 430.

<sup>22</sup> See also *Canada Atlantic Grain Export Co. Ltd. v. Eilers* (1929) 35 Lloyd's L.R. 206.

<sup>23</sup> [1969] 2 AC 31.

<sup>24</sup> P. 77.

"What subsection (2) now means by "merchantable quality" is that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description."

What Lord Reid was saying is that, the goods tendered are not merchantable if they are not fit for any of the purpose for which goods of the contract description are normally used. In *Henry Kendall & Sons v. Lillico & Sons Ltd.*, the plaintiffs (Hardwick) were game farmers in Suffolk and the defendants (SAPPA) were animal food compounders who compounded food for pigs and poultry. The plaintiffs bought compounded meals to be fed to their pheasants and partridges, which they reared for stock and sale. The meal contained Brazilian groundnut extraction which was contaminated by fungus and the birds died or became deformed. The plaintiffs brought an action against the defendants who paid them damages. The defendants sought indemnity by bringing an action against the retailer, Grimsdale, who in turn brought an action against Kendall, the wholesaler. The majority of the House of Lords held that the groundnut extraction was not unmerchantable for the simple reason that it was perfectly suitable for compounding animal feeding stuff for other animals. It was only unsuitable for poultry, and as such it would not be reasonable to hold that the groundnut extraction was not merchantable just because it was not fit for compounding meal for poultry. The fact that it was still fit for compounding meals for other animals made the groundnut extraction still merchantable and capable of use for



one of the main purposes for which such goods were commonly bought. Furthermore it could still be sold under the description as "Brazilian groundnut extraction."

Lord Reid and Lord Morris agreed with Havers J., at first instance, who held that the goods were merchantable. Havers J. applied Lord Wright's test of merchantable quality, i.e. if the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description, the goods are not merchantable. No reference was made to the element of price. Lord Pearce and Lord Wilberforce thought that Lord Wright's test was inadequate and preferred to rely on Farwell L.J.'s test as amplified by Dixon J. Based on that they held that the goods were not merchantable. Lord Guest alone preferred the approach of Dixon J. and held that there was no evidence that the price at which the goods were sold after the defect had been discovered was other than the ordinary price for the goods and as such the judge's finding was justified.<sup>25</sup>

The court was faced with different approaches and tests of merchantability. Which one was to prevail? A satisfactory test, proposed by Davies, would have been a combination of Lord Wright's test with that of Dixon J. Lord Wright's test by itself was not adequate to deal with cases where the goods are irregular or "seconds" but could still be saleable under the same name and still be fit for other usual purposes. For example, rice, under that description, can be used for consumption by people as well as by poultry. If a buyer bought rice for his own consumption, but found it not

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<sup>25</sup> At p. 108.

suitable for his consumption but fit only for his poultry, he would have no remedy under section 14(2). But adding the element of price by Dixon J., it can be decided whether the rice is merchantable or not. Rice for human consumption must be of a higher price because it is of a better quality, but rice for the poultry would be of a lower price and of lesser quality.<sup>26</sup> Thus, Davies' proposed test was: "merchantable quality means that the goods in the form in which they were tendered were of no use for any purpose for which goods which sold at the price and which complied with the description under which the goods were sold would normally be used, and hence were not saleable under that description or at that price."<sup>27</sup>

### **(c) STATUTORY DEFINITION OF MERCHANTABLE QUALITY**

The statutory definition of merchantable quality was first introduced by the Supply of Goods (Implied Terms) Act 1973. The definition was incorporated into the Sale of Goods Act 1979 in section 14(6) to read:-

"Goods of any kind are of merchantable quality within the meaning of subsection (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances."

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<sup>26</sup> See C. Davies, "Merchantability and Fitness for Purpose: Implied Conditions of the Sale of Goods Act, 1893", *Law Quarterly Review*, 1969, p. 74.

<sup>27</sup> *Id.* p.40

This definition is based on a relatively simple concept of fitness of goods for the usual purposes for which they are bought.<sup>28</sup> And according to the Law Commissions, this definition is in line with the Uniform Law on the International Sales of Goods<sup>29</sup> and one of the minimum standards of merchantability laid down in the Uniform Commercial Code.<sup>30</sup>

The test of merchantability is meant to be flexible and to be applicable to a wide range of circumstances. But, despite being statutorily defined, "merchantability" is still not free from problems and criticisms. Firstly, the gist of subsection (6) is that the goods must be "fit for the purpose or purposes for which goods of that kind are commonly bought". It appears that the goods must be fit for all their normal purpose or purposes, whereas under the old definition, goods would be merchantable if they are fit for any one of their normal purposes, even though unfit for the other/s.<sup>31</sup> The new definition places emphasis on the purpose or the usability of the goods to the exclusion of everything else. This criteria is helpful with regard to defective consumer goods because most consumer goods have only one purpose, e.g. a washing machine which

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<sup>28</sup> Law Commissions' Report No. 24, 1969, First Report: Amendments to the Sale of Goods Act 1893, p. 16.

<sup>29</sup> Uniform Law of International Sale of Goods, Article 33(1), "The seller shall not have fulfilled his obligation to deliver the goods, where he has handed over: ... (d) goods which do not possess the qualities necessary for their ordinary or commercial use;...."

<sup>30</sup> Article 2-314(2), "Goods to be merchantable must be at least such as ... (c) are fit for the ordinary purposes for which such goods are used ..."

<sup>31</sup> *Henry Kendall & Sons v. William Lillico & Sons Ltd.* [1969] 2 AC 31.

does not spin or a vacuum cleaner which does not suck dust will not be merchantable. However, with multi-purpose goods there would be some difficulties. By the wordings of subsection (6), it might be thought that such goods must be fit for all such purposes, but in the case of *Aswan Engineering Establishment Co. v. Lupdine Ltd.* (1987)<sup>32</sup> the court upheld what had been decided in the earlier cases that it is not necessary that the goods must be fit for all the purposes.<sup>33</sup> In this case the plaintiff was a construction company carrying out construction work in Kuwait. They bought from the first defendants a quantity of waterproofing compound to be shipped to Kuwait. This compound was supplied in heavy plastic pails which were manufactured by the second defendants. Upon arrival in Kuwait, the pails were stacked five or six high and they were left on the quayside in very hot sun. As a result the pails melted and gave way under their own weight. The waterproofing compound was lost. Had the pails been stored in a proper manner, they could have withstood the heat. It was held by the trial judge that the plaintiffs' action against the first defendants under the contract should succeed, but the first defendants' action against the second defendants failed because the pails were not unmerchantable under section 14(2). This decision was upheld by the Court of Appeal. It was still a good law that if goods were capable of many uses, fitness for at least one of the uses would make them still merchantable.

Secondly, the subsection requires the goods to be fit for such use as "it is reasonable to expect" having regard to the various factors enumerated in the statutory

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<sup>32</sup> [1987] 1 WLR 1.

<sup>33</sup> *Henry Kendall & Sons v. William Lillico & Sons Ltd.* [1969] 2 AC 31.

definition. If goods are bought for use, but suffer from cosmetic defects which do not impair their function, does this mean that they are not merchantable? Under the common law merchantable did not mean good, fair or average quality: goods might be inferior or even of bad quality but still would be merchantable within their description. In the case of *Bartlett v. Sidney Marcus Ltd.* (1965),<sup>34</sup> the plaintiff bought a second-hand car and was informed of the defects in the clutch and oil-pressure gauge. He was told that they were not serious. After a few weeks, other problems appeared and the plaintiff sued for the cost of repairing them. At the first instance, it was held that the car was not merchantable. On appeal, this decision was reversed and was held by Lord Denning that,

" .... a buyer should realise that, when he buys a second-hand car, defects may appear sooner or later and in the absence of an express warranty, he has no redress...."<sup>35</sup>

In *Cehave N.V v. Bremer Handelsgesellschaft mbH* (1976)<sup>36</sup> the sellers agreed to sell to the buyer 12,000 tons of citrus pulp pellets, delivery to be c.i.f. Rotterdam and shipment to be made in good condition. The buyers paid the price and the goods were unloaded. They found that, although the cargo in one hold was perfectly sound, part of the cargo in another hold was severely damaged through overheating. The buyers rejected the entire cargo and claimed for the return of the price. The sellers refused to

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<sup>34</sup> [1965] 1 WLR 1013.

<sup>35</sup> Id. p. 1015.

<sup>36</sup> [1976] QB 44.

repay the price. The buyers applied and obtained an order from the court for the sale of the cargo by an agent appointed by the court. The goods were bought by one Mr. Bass, who later resold it to the buyers. The buyers resumed possession of the goods and used them in exactly the same way they would have used them if they had all been sound. The court held that the goods were still merchantable. They did not have to be perfect in order to be of merchantable quality; it sufficed that they remained saleable for the purpose for which they would normally be bought., even with some reduction in price. In this case the pulp pellets were bought for use as cattle food and were still usable and had in fact been used as such, they were therefore merchantable.

In *Spencer v. Claude Rye (Vehicles) Ltd.* (1972)<sup>37</sup> the plaintiff, a barrister, bought a new Triumph "Vitesse" from the defendant's garage. The car was a "freak" and had to be returned to the dealers a dozen times in the few months after the purchase. Faults included the throttle cable coming adrift, the engine running hot, a rattle, leaks in the hood and elsewhere, a knock on acceleration, "fierce vibration" at speed, wind whistle, first signs of rust, collapse of a boot-support strut, exhaust fumes inside the car, excessive petrol consumption, and finally the radiator boiling over four times in 400 miles. The judge, Croom-Johnson J., allowed the buyer to rescind but only because of the defect of the radiator. As regards the other complaints, he said that although they were reasonable to make and must have been most irritating to experience in a new

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<sup>37</sup> (1972) The Guardian, Dec. 19, cf. *Farnworth Finance Facilities v. Attryde* [1970] 1 WLR 1053.

See Whincup, "Reasonable Fitness of Cars", *Modern Law Review*, 1975, p. 661.



car, they were not such as to justify rejection. They were all capable of adjustment or being put right without too much trouble.

The statutory definition similarly does not require goods to be perfectly fit for use. This can be seen from the cases decided after 1973. In the case of *Millar s of Falkirk Ltd. v. Turpie* (1976)<sup>38</sup> the buyer bought and took delivery of a new car in part exchange from the seller. It was agreed that the buyer would pay the balance of the purchase price in a few days. This was an action by the seller against the buyer for the failure to pay the purchase price due to him. In his defence it was alleged that the car was not merchantable in that there was a leakage in the power steering system. This was a minor defect that could be put right at a nominal cost of £25. The court held that the car was nevertheless merchantable on the ground that it was still "usable" as a car.

In the case of *Bernstein v. Pamson Motors (Golders Green)* (1987)<sup>39</sup> the plaintiff bought a new Nissan Laurel car for just under £8000. Within three weeks and only about 140 miles, the car broke down on a motorway. Upon inspection of the vehicle, it was discovered that the cause was the present of a blob of sealant in the lubricating system. This was a minor defect that could have been easily and cheaply put right. But despite it being a minor defect, it had caused extensive damage, because the blob had completely blocked the oil supply to the camshaft, causing it to seize up. Rougier

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<sup>38</sup> 1876 SLT 66.

<sup>39</sup> [1987] 2 All ER 220.

J. held that although a purchaser of a new car was entitled to expect a better-quality vehicle than a buyer of a second-hand car, nevertheless, teething problems had to be expected. However, on the facts of this case, the car was held not to be merchantable. In reaching his conclusion, the judge took into consideration several factors. First, the nature and consequence of the defect; though minor, had caused serious and extensive damage. Second, the car should have been capable of being driven safely, and this car was not safe. Third, how easy was it to remedy the defect once it occurred? In this case the repair took several days and cost over £700. So, in this case, if the minor defect did not cause an extensive damage nor give rise to safety problems, the court would not find it unmerchantable.

Thus, from the cases mentioned above, it seems that the statutory definition would lower the standard of quality of the goods, because, irrespective of minor defects, the goods are still merchantable. Even if the goods are resold at a reduced price, they would still be merchantable if they are marketable under their contract description and for their normal purpose. In the case of *B.S. Brown & Sons Ltd. v. Craiks Ltd.* (1970)<sup>40</sup> the sellers sold cloth to the buyers, which they believed was for industrial use. The buyers actually required them for resale for making into dresses. This was a common use of this type of fabric but the particular fabric supplied was not suitable because of an irregularity in the weaving. The price charged was rather high for normal industrial fabric but lower than normal price of fabric dress. The resale value of the fabric was below the contract price and still further below the price at which the

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<sup>40</sup> [1970] 1 WLR 752.

buyers had intended to resell it. The court found that the fabric was merchantable because even though the resale value was low, it was not so far below as to render the cloth commercially unsaleable as industrial fabric.<sup>41</sup>

It was not made clear whether Parliament intended to replace the old case law entirely or not. Because of this uncertainty in its application, it did not seem to have any special effect on the law and the cases decided thereafter still followed the old way, be it commercial or consumer sale.<sup>42</sup> However, in the 1980s this attitude began to change, and in cases of consumer sales, the courts were prepared to adopt a more liberal meaning of the word “merchantable”.<sup>43</sup>

#### **(d) SATISFACTORY QUALITY UNDER THE 1994 ACT**

Because of the unsatisfactory state of the law regarding merchantability of goods, a Law Commissions reviewed the situation and to suggest reforms in 1987. There were three aspects of merchantable quality which were under criticism. One, the use of the word "merchantable"; two, extensive reliance on fitness of purpose/s neglecting other aspects of quality, like appearance and finish, freedom from minor defects, etc.; three,

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<sup>41</sup> See also *Cehave v. Bremer* [1976] QB 44.

<sup>42</sup> See *Aswan Engineering Case*, *Cehave v. Bremer* and *Millars of Falkirk v. Turpie*.

<sup>43</sup> See *Rogers v. Parish (Scarborough) Ltd.* [1987] QB 923; *Shine v. General Guarantee Corp. Ltd.* [1988] 1 All ER 911; *Wormell v. RHM General Agriculture* [1986] 1 All ER 769. These cases suggest a more buyer-friendly approach,

should durability and safety be included in the definition.<sup>44</sup> According to the Commissions, the term "merchantable quality" was out-moded and inappropriate in the present situation because it reflected the notion of merchants' dealings in commercial sphere rather than a consumer transaction. Ormrod L.J. in his judgement in one decided case said:-

"the word [merchantable] has fallen out of general use and largely lost its meaning, except to merchants and traders in some branches of commerce. Hence the difficulty today of finding a satisfactory formulation for a test of merchantability. No doubt people who are experienced in a particular trade can still look at a parcel of goods and say "those goods are merchantable" or "those goods are merchantable but at a lower price" distinguishing them from "job lots" or "seconds". But in the absence of expert evidence of this kind it will often be very difficult for a judge or jury to make the decision except in obvious cases."<sup>45</sup>

The Law Commissions recommended that the term and meaning of "merchantable quality" be changed. They formulated a new definition for the word "merchantable quality" based on the test of "acceptability" which is more akin to the test of Dixon J. in *Grant v. Australian Knitting Mills* (1936). This basic principle should be accompanied with a list of aspects of quality, i.e.

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<sup>44</sup> Law Commissions' Joint Report No. 160, 1987, para. 2.9. See also chapter 3.

<sup>45</sup> *Cehave v. Bremer* [1976] QB 44, at p. 88.

- (a) their fitness for all their common purposes;
- (b) their appearance and finish;
- (c) their freedom from minor defects;
- (d) their safety and
- (e) their durability

The proposal of the Law Commission to replace the current definition of "merchantable quality" was commented upon by Livermore as being unnecessary. According to him the definition in section 14(6) was a general definition which applied to both commercial and consumer contracts and which is flexible.<sup>46</sup> If the definition was made more accurate or precise, this flexibility would be lost in case of commercial contracts.

In 1990 there was an attempt to introduce these reforms as part of the Consumer Guarantees Bill, which was a Private Members' Bill, but the Bill failed due to lack of Parliamentary time. But in 1994, the Sale and Supply of Goods act was passed, whereby the recommendations of the Law Commissions in 1987 were adopted. However, the proposed "acceptable quality" was not included in the Act. The term used is "satisfactory quality". Even though the Consumer Guarantees Bill failed for the first time, that did not stop the court from changing their attitude. In the case of

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<sup>46</sup> John Livermore, "Merchantable Quality II", **Journal of Business Law**, 1985, p. 294; Tiplady, "Supply of Goods: a Comment", **Solicitors Journal**, 1988, p. 149.

*Rogers v. Parish (Scarborough) Ltd.* (1987)<sup>47</sup> the plaintiff bought a Range Rover motor vehicle from the defendants. The vehicle was described as new but it was found to be defective in a number of respects. The parties agreed to substitute the defective vehicle with another Range Rover. Upon delivery of the substituted vehicle, its engine, gearbox and bodywork were substantially defective. There was also a substantial oil loss due to defective oil seals. Six months after delivery the plaintiff rejected the vehicle and alleged that the defendants were in breach of section 14. The plaintiff claimed, among other things, the return of all the monies paid to the defendants. At first instance, the trial judge held that the car was merchantable because the defects had not in any way rendered the vehicle unroadworthy, unusable or unfit for the normal purposes for which a Range Rover was used. The plaintiff appealed and the Court of Appeal, in allowing the appeal, held that the car was not merchantable. Mustill L.J. opined that the purpose for which "goods of that kind", namely passenger vehicles, are commonly bought would not only include driving it from place to place but also to be able to do so with the appropriate degree of comfort, ease of handling and reliability. He would also add pride in the vehicle's outward and interior appearance. Here the vehicle was sold as new, therefore, any fault acceptable in a second-hand car would not be expected in this vehicle. Furthermore, its value was far above the value of the ordinary vehicle and as such the plaintiff was entitled to value for his money.<sup>48</sup> Upon analysing this case it appears that the consumer would be in a more favourable situation because he could get more than what he had bargained for. Not only could he

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<sup>47</sup> [1987] 2 WLR 353.

<sup>48</sup> Mustill L.J. p. 359.



expect to get a car capable of being driven from one place to another, but he could expect something more than that. In economic term this is known as “consumer surplus”. This is actually the difference between the value the consumer places on a unit of product and how much the consumer actually has to pay for the unit.

This decision was applied in a subsequent case of *Shine v. General Guarantee Corp. Ltd.* (1988).<sup>49</sup> The defendant purchased an enthusiast's car from a third party and let it under a hire-purchase to the plaintiff. The car was described as being in a good condition. The plaintiff subsequently discovered that the car had been written off by an insurance company after having been submerged in water for 24 hours. The car had no specific defect or unroadworthiness, but the plaintiff brought an action against the defendant alleging breach of the condition of merchantable quality. The basis of this was his inability to obtain a rust guarantee from the car's manufacturers. The Court of Appeal held that the condition of merchantable quality implied in section 14(2) required the purchaser's reasonable expectations about the goods at the time of the sale to be considered, as well as their condition. The plaintiff thought that he was buying a second-hand enthusiast's car in good condition at a fair price when in fact he was buying at the same price a car which no one, knowing its history, would have bought at other than a substantially reduced price. Consequently there had been a breach of the implied condition of merchantable quality. In this case there was no specific defects being alleged and the car appeared generally to be usable, but despite that the court still held that it was not merchantable. It was suggested that the decisive

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<sup>49</sup> [1988] 1 All ER 911.

fact was perhaps the evidence of the dealer who said that the car would be worth £1000 less had its history been known.<sup>50</sup> Thus, as under the old law, the central general question remains, what were the buyer's reasonable expectations in the circumstances.<sup>51</sup>

Looking at these cases, it would seem that although the recommendations of the Law Commission did not pass immediately into statute, protection to consumers was well guaranteed due to the change in attitude of the courts. This change of attitude of the courts related to consumer sales, where they tended to take a more buyer-friendly approach. However, in sales other than consumer ones the courts were still rather reluctant to be liberal in their approach: for example, in the case of *B.S. Brown and Sons Ltd. v. Craiks Ltd.* (1970) In *Harlingdon & Leinster Ltd. v. Christopher Hull Fine Art Ltd.* (1990)<sup>52</sup> the subject-matter of the sale was a painting said to be by a German painter Gabriele Munter, but it turned out to be a forgery. The plaintiff sued the seller for breach of section 13 and section 14(2). The court held that the plaintiff had failed to establish that the painting was unmerchantable as defined by section 14(6) of the Sale of Goods Act 1979. This was because the complaint made by the plaintiff was based on the identity of the painter and not on the quality of the painting. The painting could still be used for the purpose of resale and/or aesthetic appreciation, and

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<sup>50</sup> See Atiyah, *Sale of Goods*, p. 175.

<sup>51</sup> See also *Bernstein V. Pamsons Motors* [1987] 1 All ER 220.

<sup>52</sup> [1990] 3 WLR 13.

therefore, it was merchantable. According to Slade L.J, with whom Nourse L.J., concurred,

"The complaint, and only complaint as to the quality of the picture, relates to the identity of the artist. There is no other complaint of any kind as to its condition or quality. If the verdict of the experts had been that the artist was in truth Gabriele Munter, the claim would not have arisen. Having concluded that this was not a contract for the sale of goods by description ... I see no room for the application of section 14. if the plaintiffs fail to establish a breach of contract through the front door of section 13(1), they cannot succeed through the back door of section 14."

However, in the dissenting judgment of Stuart-Smith L.J., he said that he would agree with the above proposition if the sale was simply for the specific picture, an article consisting of oil on board without any description as to the identity of the artist. But in this case, the parties knew perfectly well that the purpose of the sale was resale as dealers, and not merely putting the picture on the wall and enjoying its aesthetic qualities. In this situation, he could not think that it was a reasonable expectation that a fake which was virtually worthless was fit for the purpose of being sold as a painting by Gabriele Munter at a price of £6000. In this case the court was said to have been influenced by the fact that the attribution of artistic works is not an exact science, and that anyone dealing in fine art is taking a calculated risk.<sup>53</sup>

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<sup>53</sup> Bradgate and Savage, *Commercial Law*, p. 192.

## **(II) ELEMENTS UNDER SECTION 14(2)**

As mentioned earlier, the 1994 Act has reformulated section 14(2) of the Sale of Goods Act 1979.<sup>54</sup> Despite its redefinition, the new section still contains the important elements of the old law, thus retaining the relevancy of the old cases. In order to successfully claim under section 14(2), the buyer has to prove these elements:-

- (a) Seller must be acting in the course of a business.
- (b) Goods were supplied under the contract.
- (c) If defects are brought to the buyer's attention or are revealed by any examination made by the buyer, the implied term of merchantable quality will be excluded.

### **(a) SELLER ACTING IN THE COURSE OF BUSINESS**

Under section 14(2), it is a requirement that the seller must act in the course of business. This means that it applies to all business sales. There is a similar provision in section 1(1) of the Trade Description Act 1968, as well as in section 12 of the Unfair Contract Terms Act 1977. Their provisions also require the sale to be "in the course of a trade or business". In a decided case it was held that a sale by a seller who was in a car hire business was a sale "in the course of a trade or business" for the purposes of the Trade Description Act 1968. The judge said that in a car hire business it is a usual

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<sup>54</sup> See chapter 3.

practise to buy and dispose cars and the application of the trade description in the course of that sale was an integral part of the business of a car hire.<sup>55</sup>

In *Davies v. Sumner* (1984),<sup>56</sup> the defendant, a self-employed courier, bought a car which he used exclusively for the purpose of his business. A year later he sold the car in part exchange for a new vehicle. He signed an invoice, recording the mileage of the car as shown on the odometer, and received credit appropriate to that mileage against the price of the new vehicle. He was convicted of an offence under the Trade Description Act 1968, whereby he had falsely described the car to have travelled 18,100 miles when its true mileage was in excess of 118,000 miles. The defendant appealed and the Divisional Court allowed the appeal, holding that the offence of applying a false trade description contrary to section 1(1) of the Act was committed only if the transaction in respect of which the false trade description was applied formed an integral part of the defendant's trade or business and the fact that the car was used substantially or even exclusively in the course of the defendant's business was not of itself to bring the transaction into the section. The prosecution appealed against this judgment. In dismissing the appeal it was held that, the words "in the course of trade or business" were intended to limit the application of section 1(1) to transactions which had some degree of regularity so that they formed part of the normal practice of a business. There was an absence of an established practice by the defendant of buying

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<sup>55</sup> *Haverling London Borough Council v. Stevenson* [1970] 1 WLR 1137, see Lord Parker C.J.'s judgment at p. 1137. See also *Buchanan-Jardine v. Hamilink* 1983 SLT 149.

<sup>56</sup> [1984] 1 WLR 1301.

and selling cars; the disposal of a vehicle which constituted the equipment and not stock in trade of his business did not fall within the section. Therefore, the disposal was not an offence.

The decision in the above case was applied in the case of *R & B Customs Brokers Co. Ltd. v. United Dominions Trust Ltd.* (1988).<sup>57</sup> In this case, The plaintiff company bought a car on conditional sale for a private use by one of the directors. The sale arranged through the defendants, a financial company. The car was delivered before the contract was concluded. The director discovered that there was a leakage in the roof and he expected the dealers to put this right. Repairs were done but the defects could not be put right. The company rejected the car and claimed damages against the defendants for breach of contract. The defendants claimed against a third party. There was a clause in the defendants' agreement that the conditions of description, quality or fitness for any purpose was excluded, unless the buyer was dealing as a consumer. In the first instance, judgment was given in favour of the company (and in favour of the defendants against the third party). The exclusionary term in the contract was not applicable since the company was acting as a consumer. The third party appealed and it was held, **inter alia**, where an activity was merely incidental to the carrying on of a business, a degree of regularity had to be established. Such regularity would make the activity an integral part of the business and so was carried on in the course of that business. On the facts of the case, the necessary degree of regularity was not proven and the company was acting as a consumer, the implied term could not be excluded.

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<sup>57</sup> [1988] 1 WLR 321.



In both these cases, it can be seen that "in the course of business" implies that there must be some kind of regularity in the practice or that the goods concerned form an integral part of the business. But on the other hand, in the case of *Buchanan-Jardine v. Hamilink* (1983)<sup>58</sup> the court held that under the Sale of Goods Act 1979, the final sale of items to wind up a business is a sale in the course of a business. In transactions for the supply of goods, there is also this provision.<sup>59</sup> The phrase must be given a uniform interpretation in all these statutes which are meant to protect consumers. But such uniform interpretation is subject to the facts of each particular case when deciding whether the seller is really selling in the course of business.

The next relevant question to ask is, what does it mean by business? Under section 61(1) of the Sale of Goods Act 1979 and section 18 of the Supply of Goods and Services Act 1982, "business" means to include a profession and the activities of any government department (including a Northern Ireland department) or local or public authority. Whatever activity which has some commercial involvement in it would be a business, but it does not necessarily mean that the business be for profit. The rationale for imposing such liability upon the seller in business is, because of the regularity of

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<sup>58</sup> 1983 SLT 149.

<sup>59</sup> Sections 4 & 9 of the Supply of Goods and Services Act 1982. Section 13 of the Act states that the supplier of a service who acts in the course of a business will supply the service with reasonable care and skill.

their dealings they are expected to have some expertise and competence in the goods supplied.<sup>60</sup>

## **(b) GOODS SUPPLIED UNDER THE CONTRACT**

The phrase "goods supplied under the contract", included in the section by the 1973 Act, extended the requirement of merchantable quality to cover more than the mere goods.<sup>61</sup> The containers in which the goods contained and the packaging in which the goods were packed are all included in the merchantability of goods. What about labels and instructions, are they included in the merchantability of the goods?

### **(i) Liability for Labelling and Instructions**

This century has witnessed the mass production of complicated goods which cannot be used without accompanying instructions, for example computers and self-assembly furniture. Instructions can be on how to use the goods, how to maintain the goods, how to construct and built the goods and how to avoid hazards in relation to or emanating from them.<sup>62</sup> With the increase in sales of pre-packaged goods, labelling has become an important necessity, not only as a means of identifying those goods, but also to guide or warn the buyer-user of the correct use of the goods. The question that arises now is, can the seller be liable for the labelling and instructions of his goods? On

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<sup>60</sup> Davies, *Textbook on Commercial Law*, p. 91.

<sup>61</sup> *Gedding v. Marsh* [1920] 1 KB 668; *Wilson v. Rickett Cockerell & Co. Ltd.* [1954] 1 QB 598; *Duke v. Jackson* 1921 SC 362.

<sup>62</sup> MacLeod, "Instructions as to the Use of Consumer Goods", *Law Quarterly Review*, 1981, p. 550.

behalf of sellers, it can be argued that these are only effective forms of advertising and marketing products. But buyers see them as valuable information which will help them to decide the merits of the product before buying them. It was suggested that a seller could be made liable for labelling and instructions in two ways; first, the written labels and instructions are integrated as a term of the contract of sale. Second, it is regarded as part of the "goods" within the meaning of the Sale of Goods Act 1979, and thus subject to the implied term under the Act which relate to quality and fitness.<sup>63</sup>

In the case of *Wormell v. RHM Agriculture (East) Ltd.* (1986)<sup>64</sup> the plaintiff who was a farmer telephoned the defendant who was a dealer in agricultural produce to enquire whether he had any herbicide to kill wild oats in wheat fields. The defendant recommended Commando, and this was duly ordered by the plaintiff. On the copy of the instructions found on the cans, the product was to be applied only between particular stages of crop growth and during particular weather conditions. It was added that "damage may occur to crops sprayed after the recommended growth stage". The plaintiff understood this to mean that, although damage to the crop might result, the herbicide would nevertheless be effective to kill the wild oats. As the infestation of wild oats was getting serious, the plaintiff was willing to run the risk of some loss to his crop and Commando was applied later than normal. Although there was no damage to the crop, the herbicide was ineffective to get rid of the wild oats. The

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<sup>63</sup> Ian Brown, "Liability for Labelling of Goods and Instructions for Use". *Lloyd's Maritime and Commercial Law Quarterly*, 1988, p.502.

<sup>64</sup> [1986] 1 All ER 769.

plaintiff sought damages from the defendants for breach of the implied terms under section 14(2) and (3). At the first instance the decision was passed in favour of the plaintiff, in that, there had been a breach of the implied term because the instructions were ambiguous and misleading. Those instructions on the can being part of the goods was subject to the implied terms under the Sale of Goods Act 1979. The "goods", meaning the "Commando" in its container with its packing and instructions were not merchantable. The defendant appealed and in allowing the appeal the Court of Appeal held that the "Commando" had a clear warning that the contents should not be used after a certain time and the plaintiff was given notice of that. He could not complain if because of his own misunderstanding the herbicide was rendered unfit for its purpose.

Brown in his article suggested that the decision of the first instance was more preferable because:-

- (1) The court gave no consideration to the legal position of the instructions attached to the goods, whereas this was a good opportunity to settle the law on this issue.
- (2) While the concept of being "put on notice" can be applied to the commercial buyer, it should have minimum application in consumer sale of consumer goods.
- (3) Even though the court decided that the warning was clear to the buyer, this should not be taken as sufficient to exempt the seller from liability. If this is so, then sellers would be encouraged to produce inferior goods and include a warning as an exemption.

(4) The court's decision was not in accordance with the views of the Law Commission, which envisage imposing liability where instructions are defective or misleading.<sup>65</sup>

Tettenborn, who expressed a different view from Brown, opined that to expand the seller's duty to encompass defective directions as well as bursting bottles is a huge leap in the law. There is a great distinction between the two instances. The buyer in the case of *Gedling v. Marsh* (1920)<sup>66</sup> did not receive decent goods at all, while Wormell did get what he wanted. His only complaint was that he was not being told of the consequence of the improper use of the product. If this distinction is ignored, then there would be a disharmony between subsections (2) and (3). Subsection (2) enables the buyer to claim for defective goods, and subsection (3) give a claim for the buyer who had relied on the seller's skill and judgement that the goods were fit for their particular purpose. In the facts of Wormell's case, the buyer did not get defective goods, but what he got was herbicide which did not answer his particular purpose. If, defective instructions made the goods unmerchantable, then subsection (3) would be made redundant. It would also cause injustice to the intentions of the parties and there is a danger of over-generalisation.

The issue of seller's liability for inadequate instructions and labels was discussed by the Law Commissions in their Working Papers.<sup>67</sup> They suggested that goods sold

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<sup>65</sup> Ian Brown, op. cit. p. 512-513.

<sup>66</sup> [1920] 1 KB 668.

<sup>67</sup> Law Commissions Working Papers No. 85, para. 4:16.

without adequate instructions would be unlikely to meet the standard of quality. This suggestion was made in relation to the discussion on whether to include a specific reference to the suitability for immediate use in the new definition of merchantable quality. If its immediate use is prevented because there is no adequate instructions to assemble the kit, then it would be likely that the goods are not of the required standard. This is because, without adequate instructions the kit could not be assembled or if assembled wrongly, the kit would not be fit for its purpose. However, the suggestion (to include suitability for immediate use aspect) met with disapproval because there are many cases where even though the goods are not suitable for immediate use, the sales are quite proper.<sup>68</sup> So, in their final report, the Law Commissions dropped this aspect in the new definition of merchantable quality. This recommendation was adopted in the 1994 Act, also without that provision.

The question now is, what is the status of instructions and how relevant is it in deciding the fitness of the goods? The decision of the first instance in *Wormell's case* echoed the view of the Law Commissions, i.e., instructions were considered part of the goods, and therefore, would affect their quality. If they were ambiguous or complicated, and the goods could not be effectively used when applied in accordance with such instructions, the goods were not fit for their purpose. But when the case went on appeal to the Court of Appeal, the decision was reversed, but nevertheless, the court held that instructions were still relevant in deciding fitness for purpose. The instructions in this case were clear as regards to the time for spraying. When the

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<sup>68</sup> Law Commissions' Joint Report No. 160, 1987, para 3.64.



plaintiff used it after the recommended period, he ignored the warning and chose to take his chance. He could not then turn around and say that the weedkiller was not fit for its purpose.

Suppose that the instructions were, in actual fact, misleading, ambiguous and inadequate? Will it go to affect the quality of the goods? There has been no decided case on the point, but its importance cannot be denied. The only thing to decide is how much weight should be attached to it. This will depend on the circumstances of the case. For example, where the buyer has the expertise or experience with the goods, to him the instructions may be a mere notice. What is more relevant to him is his expertise and experience rather than the instructions. On the other hand, if the buyer is not an expert and this is the first time that he comes across the particular thing, he will need as much information as possible regarding it. In this latter situation, instructions would be given due weight because the buyer relies on them to enable that the thing can be used for its purpose.

## **(ii) Second-hand Goods**

The statutory provisions about quality are as applicable to second-hand goods as to new goods. However, such goods, bought at a lower price, cannot be expected to be in as perfect condition as new goods which are bought at a higher price. Thus, one might expect to find that the acceptable level of fitness is lower as regards used goods. There are many cases involving sale of second-hand goods and most of them concern motor vehicles. From these cases it can be seen that there are various legal attitudes

towards merchantability of second-hand vehicles. Starting with the case of *Bartlett v. Sidney Marcus Ltd.* (1965),<sup>69</sup> here there was a sale of a used Jaguar car for £950. The seller warned the buyer that the clutch might need a minor repair. After four weeks and after having driven for some 300 miles, the buyer had to carry out the repair which cost him £45. He claimed damages for breach of section 14 but his claim was dismissed by the court on the ground that the car was "in usable condition even though not perfect.... It was fit to be driven along the road safely." The court accepted the fact that a second-hand car would be likely to require repair sooner than a new one would. And the more valuable the car, the more expensive is the repair.

A more favourable result for the buyer is found in the case of *Crowther v. Shannon Motors Co.* (1975).<sup>70</sup> The buyer bought a Jaguar for £390 on the assurance by the seller that it was in good condition. The car was an eight-year-old model and had run over 80,000 miles. The buyer had driven the car for 2,354 miles over a period of three weeks, after which the engine seized up. The engine was found to be in an extremely bad condition, and a reconditioned engine had to be fitted. The buyer claimed damages for the cost of the replacement engine and for the loss of use, totalling £460. The Court of Appeal held for the buyer and awarded him the amount of damages claimed. This case was distinguished from the earlier case of *Bartlett* on the ground that a "clapped out" engine was something totally different from minor repairs.

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<sup>69</sup> [1965] 1 WLR 1013.

<sup>70</sup> [1975] 1 All ER 139.

The case of *Lee v. York Coach and Marine* (1977)<sup>71</sup> also involved sale of a second-hand vehicle. The car was found to be unmerchantable but the buyer was not allowed to reject it because of lapse of time. The buyer bought a second-hand Morris 1100 for £355. Shortly after the purchase the car was off the road for repairs by the seller, which were not too successful. Seven weeks after the sale, the buyer through her solicitors sought to rescind the contract, but the seller offered to do some further repairs. The car was found to have severe defects. Four months later the buyer brought an action claiming for the return of the price. The Court of Appeal found that the car was far from being merchantable. But nevertheless, the buyer could not reject because it was too late and she was deemed to have accepted the car. She was only awarded damages to the amount of £100.

In a more recent case, a further change in the attitude can be seen. In *Business Appliances Specialists Ltd. v. Nationwide Credit Corp. Ltd.* (1988)<sup>72</sup> the buyer bought a second-hand Mercedes car which had done some 37,000 miles for £14,850. After a few months and after travelling for only 800 miles, some defects began to appear. These defects were repaired costing £635. In the course of the trial expert evidence was given to show that such defects were not usual on Mercedes cars of such age and mileage. It was nevertheless held in this case that there was no breach of the implied condition of merchantable quality. It must be expected of a second-hand vehicle to have some defects and some wear and tear. However, in *Shine v. General*

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<sup>71</sup> [1977] RTR 35.

<sup>72</sup> [1988] RTR 332.

*Guarantee Corp. Ltd.* (1988)<sup>73</sup> the court made a different finding. As already noted, the car in this case had been submerged in water for some 24 hours and had been the insurance company "write-off". Although there were no specific allegation of defects, the Court of Appeal held that it was not merchantable.

### **(iii) Time and Durability**

Section 14(2) of the Sale of Goods Act 1979 provides for the merchantability of the goods but it does not specify at what time the goods must be merchantable, nor does it give the buyer any assurance of the durability of the goods. Can the seller be said to have fulfilled his obligations if he provides goods which, on delivery, are reasonably fit for their purpose and are merchantable, but within a short period thereafter proved to be defective? Put in another way, are the implied terms of fitness and merchantable quality continuing warranties?

In the case of *Crowther v. Shannon* [(1975)]<sup>74</sup>, the issue before the court was whether lack of reasonable durability at the time of the sale is to be accounted a breach of the terms implied under the Act. The plaintiff bought a second-hand Jaguar of which engine seized up after three weeks. He claimed against the seller for breach of the implied condition of reasonable fitness. At the county court, the judge (Judge Micheal Lee) held in favour of the buyer that fitness for purpose here meant that the car should be fit "to go as a car for a reasonable time". On appeal that decision was

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<sup>73</sup> [1988] 1 WLR 911.

<sup>74</sup> [1975] 1 WLR 30.

upheld but Lord Denning expressed his doubt as to the formulation of the issue by the county court judge. According to him "the relevant time is the time of sale" and failure within a "reasonable time" after sale was evidence which went to show that goods were not reasonably fit for purpose at the time when they sold. What was said by Lord Denning, that failure within "a reasonable time" of sale as being evidence of unfitness for purpose at the time of the sale is true, but this did not imply the requirement that the qualities in the goods are lasting.<sup>75</sup> If there is no requirement of durability under the implied terms, the "reasonable period" within which the defects occurred which was evidence of unfitness and unmerchantability at the time of the sale may be shorter than the normal life span expected of such goods.<sup>76</sup>

In the case of *Mash & Murrell Ltd. v. Joseph I. Emanuel Ltd.* (1961)<sup>77</sup> the plaintiff agreed to buy from the defendant 2,000 half-bags of Cyprus Spring potatoes then aboard the SS. Ionian bound for Liverpool. The defendant knew that the potatoes were for human consumption. On arrival the potatoes were found to be unfit for human consumption. The plaintiff sued for breach of the implied terms as to fitness and merchantable quality. Diplock J (as he then was) held that there had been a breach of the undertaking, and said that the inevitable deterioration during transit which will render the goods unmerchantable upon arrival is normally one for which the seller is

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<sup>75</sup> Hudson, "Time and Terms as to Quality in Sale of Goods", *Law Quarterly Review*, vol. 94, p.566 at p. 567.

<sup>76</sup> *Ibid.*

<sup>77</sup> [1961] 1 WLR 862.

liable. He also said that when goods are sold under a contract such as a c.i.f contract, or a f.o.b. contract, which involves transit before use, there is an implied warranty not merely that they shall be merchantable at the time they are put on the vessel, but that they shall be in such a state that they can endure the normal journey and be in merchantable condition upon arrival.<sup>78</sup> What he meant is that the goods must be merchantable not only when shipped but on arrival in the United Kingdom and for a reasonable time thereafter. The finding of Diplock J. was however, reversed on the facts because there was no sufficient evidence to support it.

Twenty-one years later Lord Diplock was faced again with the issue of durability in the case of *Lambert v. Lewis* (1982).<sup>79</sup> He held that the implied warranty of fitness for a particular purpose is a "continuing warranty which will continue for a reasonable time after delivery, so long as they remain in the same apparent state as that in which the goods were delivered, apart from normal wear and tear". What is reasonable is a question of fact depending on the nature of the goods. In this case there was a tragic accident involving the plaintiffs and the employee of a farmer who was driving a Land Rover while towing a trailer. The trailer got unhitched and slewed across the road into the path of the plaintiffs' car. The coupling was found to be defective so as to cause the trailer to be detached from the towing vehicle. The issue here is whether, at the time of the accident, the dealer's warranty of fitness of the coupling was still continuing. The defect in the locking mechanism of the coupling was discovered by

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<sup>78</sup> Id. p. 865.

<sup>79</sup> [1982] AC 225.



the farmer three to six months before the accident. Up to that time, the farmer could have relied on the dealer's warranty of fitness to escape liability. But after the defect had become apparent to him, it would be unreasonable to hold the dealer liable for its continuous safety. For this reason it was held that the farmer was liable for negligence towards the plaintiffs. The dealer cannot be expected to continuously warrant the fitness of the goods because the farmer had already become aware of it. It became his duty to remedy the defects in his vehicle.

As far as Scotland is concerned, authorities on the question of durability is very limited.<sup>80</sup> In the case of *Knutsen v. Mauritzen* (1918)<sup>81</sup> it was held that the implied term of fitness for purpose is of a continuing nature. In another case, *Buchanan & Carswell v. Eugene Ltd.* (1936)<sup>82</sup> the hair-drying machine which had been used for nineteenth months had satisfied the durability requirement. If there had been any structural defects, they would have become apparent sooner than that. As such the reasonable time for the durability of the goods had been met.

Whatever the law was prior to the 1994 Act, regarding durability, it was not satisfactory for the simple reason that it was unclear. Although quality was to be satisfied at the time of delivery, and it should continue until a reasonable time thereafter, there was no express reference in the old provision to the concept of

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<sup>80</sup> Ervine, "Durability, Consumers and the Sale of Goods Act", 1984, *Juridical Review*, 147.

<sup>81</sup> 1918 1 SLT 85.

<sup>82</sup> 1936 SC 160.

durability. Also there was no reference to the time when the term as to quality must be satisfied. The Law Commissions proposed to resolve three particular issues relating to the requirement of durability:-

- (1) Should the requirement be that the goods should last for a "reasonable" time, or should it lay down a "specific" length of time for which goods should last?
- (2) Should the requirement be broken at the time of supply or at the later time when the goods are shown not to have lasted as long as they should have done?
- (3) Should the requirement be part of the implied term as to quality or should it be a separate implied term?<sup>83</sup>

As to the first issue, the Law Commissions agreed that durability should be for a "reasonable" time so as to be applicable to all types of goods, irrespective of the treatment given to it or their grades. Secondly, the requirement of durability should bite at the time of supply and not later. Of course it is only later that the lack of durability will be discovered, i.e. the time when the defects become apparent. But this will be evidence that the goods were not sufficiently durable when they were supplied. Thirdly, the requirement of durability is only to be an aspect of quality and not a separate implied term.<sup>84</sup>

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<sup>83</sup> Law Commissions' Joint Report No. 160 para. 3.48.

<sup>84</sup> *id.* para 3.51 – 3.57.

These recommendations by the Law Commissions had been included in the 1994 Act. In subsection 2B, the quality of goods includes their state and condition, and one of the relevant aspects of quality is durability. The other aspects include appearance and finish, freedom from minor defects and safety. With the new legislation it is hoped that a buyer of a new car can be rest assured that his car will not only appears new, without any blemish on its exterior paint work, but also is free from any minor defects and is safe to drive. In short, the new legislation should guarantee a "perfect tender" to the buyer. This is, however, subject to description and price of the goods.

#### **(c) EXCEPTIONS TO SECTION 14(2)**

Section 14(2) provides two exceptions in which the implied condition of merchantable quality is dispensed with. First, there is no implied condition "as regard defects specifically drawn to the buyer's attention before the contract is made". This provision was added into the subsection by virtue of the Supply of Goods (Implied Terms) Act 1973. The proviso required the defects to be specifically drawn to the buyer's attention. What this means is that, the seller should point out the particular defect to the buyer. It is not sufficient if the defect is described in the general terms or if it is not particularised.<sup>85</sup> How much information to be communicated to the buyers depends on the circumstances of the case. It suffices if the information generally draws the buyer's attention to a defect, provided that the buyer is not misled as to the nature of the

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<sup>85</sup> Goode, *Commercial Law*, p. 259.

defect.<sup>86</sup> It is irrelevant as to who points out the defect to the buyer. But the defect must be drawn to the buyer by somebody. The proviso has no application if the buyer himself discovers the defect.

The second proviso is that "if the buyer examines the goods before the contract is made there is no implied condition as regards defects which that examination ought to reveal". It is important to note that there is no obligation for the buyer to examine and if he does examine, even cursorily, that will not affect his right to complain about the defects which that examination could not be expected to reveal. Under the original provision, if there had been an examination, the buyer would not be able to sue if the defects were not discovered due to an examination hastily done. In *Thornett & Fehr v. Beers & Sons* (1919),<sup>87</sup> the buyer bought glue from the seller but being pressed for time he only inspected the glue from the outside although full examination was offered. It was held in this case that the implied condition of merchantable quality did not apply. The wordings in the proviso referred to the "defects which such examination ought to have revealed". This proviso was illogical and did not make sense because it penalised a buyer who took the trouble actually to examine (but did so carelessly) and protected a buyer who had ample opportunity to examine but refrained from doing so. To avoid the same result as in this case, the proviso was amended; "such examination" was replaced with "that examination". In the case of *Frank v. Grosvenor Motor Auctions*

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<sup>86</sup> Ibid.

<sup>87</sup> [1919] 1 KB 486.

*Pty. Ltd.* (1960)<sup>88</sup> the proviso was thought to exclude those defects which ought to have been discovered from the actual examination. If the examination was not a reasonable one, those defects which could have been discovered only by a reasonable examination will not be excluded.

In *R & B Customs Brokers Co. Ltd. v. United Dominion Trust* (1988)<sup>89</sup> the buyer took delivery of the car before the contract was legally concluded, and discovered that the roof was leaking and this was put right by the dealers. Despite various attempts made to repair the leak, it was still unsatisfactorily mended. The buyer sought to reject the car on the ground that it was not fit for its purpose and was not merchantable. The Court of Appeal held in favour of the buyer on the ground that there was a breach of section 14(3). As regards subsection (2), the court gave no opinion on the issue. According to Dillon L.J. the statutory wording could pose as a trap to the buyer who took delivery of the goods before concluding the contract, because if he examined the goods and discovered the defects, the implied condition of merchantable quality will not be applied and he cannot reject the goods.

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<sup>88</sup> [1960] VR 607.

<sup>89</sup> [1988] 1 All ER 846.

### **(III) MERCHANTABILITY UNDER OTHER STATUTES**

#### **(a) UNIFORM COMMERCIAL CODE**

The Uniform Commercial Code discriminates between a merchant seller and a casual seller. On a merchant seller it imposes a higher standard compared to a non-merchant seller. Who is a merchant? Under the Code a merchant is someone who deals in goods of the kind in question or one who by his occupation represents himself as having knowledge or skill peculiar to the practices or goods involved in the transaction or if he or she employs someone who qualifies as a merchant, under the first two definitions, to act on his or her behalf.<sup>90</sup>

Article 2-314 of the Uniform Commercial Code creates an implied warranty of merchantable quality. It provides:-

(1) Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to the goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:-

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

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<sup>90</sup> Dunfee, **Business Law**, p. 352.



- (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - (e) are adequately contained, packaged, and labelled as the agreement may require; and
  - (f) conform to the promises or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified other implied warranties may arise from course of dealing and trade usage.

Under this Article, goods are merchantable if they are fit for the ordinary purposes for which they are sold. In the case of *Taterka v. Ford Motor Company* (1978)<sup>91</sup> Taterka bought a Ford Mustang from a Ford Dealer. After thirty-four months and 75,000 miles, he discovered that the tail light assembly gaskets on his car had been installed in such a way as to enable water to enter the tail light and caused it to rust. Taterka sued Ford for breach of the implied warranty of merchantability. The court held that there was no breach and he appealed. On appeal, the decision of the lower court was upheld. The Supreme Court held that, where automobiles are concerned, the term "merchantable quality" has only been applied where a single defect poses a substantial safety hazard or numerous defects classify the car as a "lemon". The rust problem did not render the car unfit for its purpose.

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<sup>91</sup> 271 N.W.2d 653 (Wis. Sup. Ct. 1978)

If such a case happens in the United Kingdom, would the court decide it the same way? Under the new provision, it is likely that the court will not decide that the car is merchantable, because quality also refers to appearance and finish. A new car does not only serve as a mere "means of transport, but of doing so with comfort, ease of handling and reliability and be of pride in its outward and interior appearance." <sup>92</sup> But then again in the above case, the car had been driven for some 75,000 miles and had been used without any problem for about thirty-four months. In this situation, it is unlikely for the court to say that dealer's warranty should still continue.<sup>93</sup> If the rust became apparent within "reasonable time" after delivery, then maybe it would be reasonable to hold the dealer liable for continuous warranty.

The Code provides a specific provision for sale of food and drink. It implies a warranty that they should be fit for their ordinary purpose, i.e., for human consumption. In deciding whether the food and drink are merchantable or not, there are two alternative tests adopted by the courts. One is the "foreign-natural distinction", where food is merchantable if it contains elements that are natural to the product. For example, while eating a cherry pie, Z broke his teeth because he accidentally chewed a cherry pit. The presence of the pit is not foreign to the food, therefore, it would still be merchantable. It would be different if there was a piece of metal in the pie. The other test is the "reasonable expectation test". The question asked is, would it be reasonable to expect the defective element in the foods? If it is

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<sup>92</sup> *Rogers v. Parish (Scarborough) Ltd.* [1987] QB 923.

<sup>93</sup> *Lambert v. Lewis* [1982] AC 225.

reasonable, the goods are merchantable. This test is quite similar to the first one; one would expect something which is natural as opposed to something which is foreign.<sup>94</sup> In the case of *Webster v. Blue Ship Tearoom, Inc.* (1964)<sup>95</sup> the plaintiff choked on fish bone while eating fish chowder. Court held that since fish chowder is made from large chunks of fish, it was reasonable to expect the presence of bones in the soup.

## **(b) VIENNA CONVENTION ON INTERNATIONAL SALE OF GOODS**

The Convention provides in Article 35(2) that:-

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

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<sup>94</sup> *Wren v. Holt* [1903] 1 WLR 506, plaintiff recovered damages for breach of implied condition of merchantability of beer which was contaminated by arsenic.

<sup>95</sup> 198 N.E. 2d 309 (Mass. 1964).

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for the lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Article 35(2)(a) lays down the seller's responsibility for quality. The fundamental idea underlying this responsibility is to imply things that go without saying.<sup>96</sup> Things are bought for use or consumption, therefore, they must be fit for their purposes. For example, raw materials are bought for processing; machinery is bought for use in production; commodities are bought for resale. It would be tedious to develop detailed technical specification of the goods; hence, paragraph 2(a) asks, "are the goods fit for the purposes for which goods of the same description would ordinarily be used?"

The Convention lays down a similar test of merchantability as in the American law and the English law prior to the 1994 amendment. The test is, whether the goods are "fit for the purposes for which such goods of the same description would ordinarily be

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<sup>96</sup> Honnold, *Uniform Law of International Sales Under the 1980 UN Convention*, 1982, p. 252.

used". Thus, all the three statutes refer to the purposes of the goods, in order to decide their merchantability.

#### **(IV) CONCLUSION**

The implied term of merchantability is the most important aspect of the law of sale and it has undergone so many changes since the time it was recognised. The latest change was made in the Sale and Supply of Goods Act 1994. The Law Commissions thought that a change in the terminology was necessary because it is out-moded. It is relevant to merchants' transaction and to natural produce rather than to consumer sales and manufactured goods. Also, it was felt that the old definition stresses too much on the issue of fitness for purpose/s, in relation to description and price, rather than other aspects of quality, like, appearance, finish, freedom from minor defects, safety and durability. The proposal for a change came as early as 1987, together with the change in attitude of the courts, but it finally came to be a reality in 1994. The Act incorporated the recommendations of the Law Commissions and at the same time endorsed the decisions of the courts.

Are there any difference in the definition of merchantable quality under the English law, American law and under the Convention? Under the English law, "merchantable quality" has been replaced with "satisfactory quality" while in America the term "merchantable quality" is still being used. Besides this difference in the term used, there is basically no difference because,-

(1) all the three laws implied that warranty,

- (2) they recognise that goods are merchantable if they are fit for their usual purposes,
- (3) they extend merchantable quality to containers, packages and labels.

The other difference is that, the English law and American law impose this responsibility on merchant sellers but exclude none-merchant sellers. The Convention, however, has no such restriction because of the character of international sales and the exclusion in Article 2(a) "of goods bought for personal, family or household use".



## **CHAPTER FIVE**

### **UNDERTAKING OF FITNESS FOR PARTICULAR PURPOSE**

#### **INTRODUCTION**

Section 14(3) contains the last of the series of the graduated protections to the buyer in a contract of sale of goods. In this chapter, I will discuss the background of the implied term of fitness for particular purpose, to see what are the changes and the reasons for the change. Reference will be made to the 1969 Law Commissions' Report on the Amendments to the Sale of Goods Act 1893. Part two will consist of the discussion of the elements of the section, followed by part three, on the relationship between section 14(3) and section 14(2). Part four will discuss fitness for a particular purpose as found in other statutes. Part five will be the conclusion and an assessment of whether section 14(3) is still necessary, given how wide section 14(2) now is.

#### **(I) BACKGROUND TO FITNESS FOR PARTICULAR PURPOSE**

The undertaking that the goods must be fit for the particular purpose required by the buyer is provided for in section 14(3) of the Sale of Goods Act 1979 which reads:-

"Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known - (a) to the seller, or (b) where the purchase price or part of it is payable by instalments and the

goods were previously sold by a credit-broker to the seller, to that credit-broker, any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the seller or credit-broker."

Like the implied warranty of merchantable quality in section 14(2), the provision of section 14(3) was a substitution of the former section 14(1), made by the Supply of Goods (Implied Terms) Act 1973. The further amendments to it were made by the Consumer Credit Act 1974. This section remained unchanged until the present day and the 1994 Act has not affected the provision of this section.

Originally section 14(1) read, "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgement, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified

article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

Like the condition of merchantable quality, fitness for particular purpose was originally implied into contracts where the buyer could not exercise his own judgment because the goods were not in existence or because he had not the necessary special skill. Where the goods were unascertained, the buyer would buy by mere description of the quality the goods should have, and also by a specification of the purpose or purposes for which the goods were required. The specification of the purpose by the buyer would indicate that he was relying on the seller's skill or judgment to supply goods fit for that particular purpose/s.

Under the old provision, section 14(1), the goods were fit for the buyer's particular purpose if:-

- (1) the buyer expressly or by implication makes known to the seller the particular purpose for which he requires the goods; and
- (2) he relies on the seller's skill or judgment; and
- (3) the goods are of a description which it is in the ordinary course of the seller's business to supply (whether he is the manufacturer or not).

There was a proviso, i.e., that where goods were sold by patent or trade name, this warranty would be excluded.

Thus under this old section, the buyer need not inform the seller as to the usual or the ordinary purpose of the goods. It would be implied even though the buyer did nothing to indicate that he required the goods for that purpose. But if the purpose is unusual, this must be expressly made known to the seller.<sup>1</sup> The implied or expressed communication of purpose will indicate whether there was reliance on the seller's skill and judgment. Finally, it must be proven that the goods must be in the course of the seller's business to supply. However, it was not necessary that the seller should deal in goods of that description. It would be sufficient if the goods are of a similar type.<sup>2</sup>

In 1969, the Law Commissions together with the Scottish Law Commissions made these suggestions:<sup>3</sup>

(1) The warranty should be implied in all sales where the seller sells in the course of business. This was necessary to avoid the problem of proving that the seller dealt with goods of the relevant description.

(2) To delete the proviso from the subsection because it was redundant. When the buyer relied on the seller's skill and judgment, there could no longer be a sale under trade or patent name.

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<sup>1</sup> *Kendall & Sons v. Lillico & Sons* [1968] 3 WLR 110.

<sup>2</sup> *Spencer Trading Co. Ltd. v. Devon* [1947] 1 All ER 284.

<sup>3</sup> Law Commissions Joint Report No. 24. 1969.

(3) To shift the burden of proving reliance from the buyer to the seller. The seller has to disprove reliance by showing that it was not reasonable to rely on his skill or judgment. This meant that reliance would be implied, but the buyer had to inform the seller of any unusual purpose to which the goods will be put to.

Besides the above, another important change to section 14(3) was the reference to credit-brokers which was introduced by the Consumer Credit Act 1974. The section thus covers also communications made by the buyer to a dealer who actually sells the goods to the seller (usually finance company) who then sells them to the buyer on credit.<sup>4</sup>

## **(II) ELEMENTS UNDER SECTION 14(3)**

A buyer who wishes to sue the seller for breach of the implied term of fitness for particular purpose, has to satisfy these elements:-

- (a) Seller sells in the course of business.
- (b) Goods are supplied under the contract.
- (c) Expressly or impliedly made known to the seller the particular purpose for which the goods are required.

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<sup>4</sup> Benjamin's Sale of Goods, p. 472 – 473.

- (d) There was reliance on the seller's skill and judgment.

The first and second elements of the section also appear in section 14(2) and have been discussed under that head in the earlier chapter.<sup>5</sup>

**(a) KNOWLEDGE BY THE SELLER OF THE PARTICULAR PURPOSE**

As we have seen earlier, if the buyer requires the goods for their usual or normal purpose, then knowledge by the seller would be implied. It is not necessary for the buyer to communicate the purpose expressly to the seller. For example, where food is bought, its obvious purpose is for consumption, so it must be fit for that purpose. In *Frost v. Aylesbury Dairy Co.* (1905)<sup>6</sup> the seller supplied milk to the buyer for the purpose of human consumption. The milk was contaminated with typhoid germs. The court held that the milk was not fit for human consumption. Sometimes the goods may have only one ordinary purpose. In the case of *Priest v. Last* (1903)<sup>7</sup> a draper bought a hot water bottle from a chemist. The indian-rubber hot water bottle proved defective and caused injury to its user. Section 14(3) was used by the buyer but challenged on the ground that it was not applicable: a hot water bottle had only one function, and the mere ordering of the goods by name or description did not constitute "some distinct

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<sup>5</sup> See chapter six.

<sup>6</sup> [1905] 1 KB 608.

<sup>7</sup> [1903] 2 KB 148, see also *Frost v. Aylesbury* [1905] 1 KB 608.



communication of the particular purpose for which the article was purchased". It was held by Collins M.R. that, in order to give rise to the implied condition of fitness, it must be shown that, although the article sold was capable of general use for many purposes, it was sold for a particular purpose. Where the description of the goods points to one particular purpose only, it seems that the first requirement of the subsection was met.<sup>8</sup>

If the buyer requires the goods for a particular purpose, which is one of the normal purposes to which the goods are put to use, he must communicate this purpose to the seller. There must be some sort of an express communication, but not necessarily in the form of an express contractual agreement. It is sufficient if there is an extrinsic communication, as in the case of *Bristol Tramways, etc. Carriage Co. Ltd. v. Fiat Motors Ltd.* (1910).<sup>9</sup> Here, the sellers knew that the buses were required for carrying passengers in Bristol, a city with steep hills. The buses proved unsuitable and the sellers were liable.

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<sup>8</sup> Id. p. 153.

<sup>9</sup> [1910] 2 KB 831.

The particular purpose for which the goods were required can also be communicated to the seller by virtue of previous transactions between the parties.<sup>10</sup> In *Grant v. Australian Knitting Mills Ltd.* (1936)<sup>11</sup> Lord Wright said:-

"There is no need to specify in terms the particular purpose for which the buyer requires the goods, which is nonetheless the particular purpose within the meaning of the section, because it is the only purpose for which anyone would ordinarily want the goods."<sup>12</sup>

There is a qualification to this rule and that is where there is any special purpose or circumstances of the buyer, of which the seller ought to have known before exercising his skill or judgment. Without that knowledge the seller will not be liable. In *Griffiths v. Peter Conway Ltd.* (1939)<sup>13</sup> the buyer bought a Harris Tweed coat from the seller and after using it she contracted dermatitis. The coat was found to be harmless to an ordinary person but the buyer suffered the disease, due to the sensitivity of her skin. The court held that the seller was not liable for the unfitness of the coat. Lord Greene M.R. said that if there is any particular abnormality suffered by the buyer, that must be

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<sup>10</sup> *Manchester Liners v. Rea* [1922] 2 AC 74.

<sup>11</sup> [1936] AC 85.

<sup>12</sup> *Id.* p. 99.

<sup>13</sup> [1939] 1 All ER 685.

brought to the seller's attention because only with that information could he exercise his skill or judgement.

This case was distinguished from *Manchester Liners Ltd. v. Rea* (1922).<sup>14</sup> The seller supplied coal to the buyer for use by their ship, The Manchester Importer. There was a limited supply of coal due to the strike, and the buyer knew that there was only one source of supply. The coal was found not to be suitable for use and the seller was held liable for breach of the implied condition of fitness. The point of distinction was that there was a standard or normal type of ship from which the buyer's ship differed. In other words, each ship is different from the other and if the seller undertook to supply coal to a particular ship, then the coal supplied must be suitable for use by that ship. On the other hand, in *Griffiths v. Conway Ltd.* the buyer differed from the ordinary person who would not have been affected by the coal. It was her abnormal sensitivity that caused her to suffer.

In the case of *Ashington Piggeries* (1972),<sup>15</sup> the animal food manufacturer claimed against the supplier for supplying herring meals which were contaminated. The suppliers knew that the manufacturer required the meal for compounding food for animals and not for fertilisers. What they did not know was that the meal was for

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<sup>14</sup> [1922] 2 AC 74.

<sup>15</sup> [1972] AC 441.

compounding food for minks. The meal was poisonous to other animals but fatal to mink. The court held that the supplier was in breach of the implied condition of fitness. Even though the supplier did not know specifically the purpose for which the meal was required, it was reasonably foreseeable to expect that the meal might be fed to the mink. Similarly, in the case of *Kendall v. Lillico* (1969)<sup>16</sup> the Brazilian groundnut extraction was found to be unfit for the purpose of compounding into feeding-stuff for cattle and poultry. Although only poultry, and not cattle, were affected by the contamination, the court held that there was a breach of section 14(3).

#### **(b) RELIANCE**

Reliance is the very thing that gives rise to the liability of the seller. Under the former provision it had to be shown that, either expressly or by implication, the buyer had made known to the seller the particular purpose for which the goods were required, so as to show that he relied on the seller's skill or judgment. The onus of proof was on him to show that there had been reliance. But reliance was almost always implied from the facts, e.g. when a buyer goes to the shop to buy an item, he is confident that the shopkeeper has selected his wares with skill and judgement.<sup>17</sup> When the purpose was not usual or special, the buyer had to make it known expressly to the seller to enable him to exercise his skill or judgment.

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<sup>16</sup> [1969] 2 AC 31.

<sup>17</sup> See Lord Wright in *Grant v. Australian Knitting Mills Ltd.* [1936] AC 85 at p. 99.

Because reliance is almost always implied, the new provision now presumes reliance until it is positively disproved, or until the seller can show it to have been unreasonable. The burden is on the seller to rebut the implication. Rebuttal is not easy, especially when the buyer had indicated to him the particular purpose for which the goods were bought. But there are some instances whereby the court will find that there is no reliance and thus no implied condition of fitness for particular purpose. Firstly, where the buyer selects the goods from the stock himself, he is relying on his own skill or judgment.<sup>18</sup> Secondly, where the buyer knows that the seller only supplies one particular commodity, he must be regarded to have taken as it is what he buys.<sup>19</sup> Thirdly, the seller may expressly declare to the buyer that he is not purporting to exercise his skill or judgment, but this might be caught by the Unfair Contract Terms Act 1977.<sup>20</sup>

If there is reliance, but that reliance is unreasonable, a claim under section 14(3) will not succeed. In what circumstances will reliance be held unreasonable? If the

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<sup>18</sup> *H. Beecham & Co. Pty. Ltd. v. Francis Howard & Co. Pty. Ltd.* [1921] VLR 428 – buyers selected timber themselves from the sellers' stock.

<sup>19</sup> *Wren v. Holt* [1903] 1 KB 610. Buyer bought Holden beer from a public house which was contaminated with arsenic. He knew that the seller only stock Holden beer and he went there in fact to drink Holden beer which he likes. Claim under section 14(3) failed for there was no reliance.

<sup>20</sup> *Harlingdon & Leinster Ltd. v. Christopher Hull Fine Art Ltd.* [1990] 1 All ER. 737.

parties to the contract of sale have equal expertise, or if the buyer has greater expertise or knowledge than the seller, then it would be unreasonable to expect reliance. In *Teheran-Europe Co. Ltd. v. S.T. Bolton (Tractors) Ltd.* (1968)<sup>21</sup> the seller sold air compressor machines to the buyer with the knowledge that it was meant for export to Iran. The machines were alleged to be unfit for use in that country. It was held that the buyer was presumed to have the necessary knowledge of the conditions in its country, and was therefore relying on its own judgment rather than the seller's. Diplock L.J. said in his judgment that,

"Where a foreign merchant .... buys by description goods .... for resale in his own country, of which he has no reason to suppose the English seller has any special knowledge, it flies in the face of common sense to suppose that he relies on anything but his own knowledge of the market in his own country and his own commercial judgement as to what is saleable there".<sup>22</sup>

What is the situation when both the parties are dealers in the type of goods sold? Can there be said to be reliance by the buyer on the seller? In the case of *Kendall v. Lillico* (1969)<sup>23</sup> the buyer and the seller were both members of the London Cattle

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<sup>21</sup> [1968] 2 QB 545.

<sup>22</sup> Lord Diplock at p. 560-561.

<sup>23</sup> [1969] 2 AC 31.



Food Trade Association. The seller argued that since they were of the same association, there could be no reliance on their skill and judgment. It was held by the majority of the House of Lords that this fact was not sufficient to rebut the presumption of reliance by the buyer on the seller.

Reliance need not necessary be total. Accordingly, partial reliance may be sufficient to give rise to liability. In *Cammell Laird Ltd. v. Manganese Bronze and Brass Ltd.* (1934)<sup>24</sup> the buyer instructed the seller to construct two propellers for a ship based on certain specifications provided by the former. There were some aspects of it which were left to be decided by the seller, for example, the thickness of the propellers. When the propellers were ready they were found not to be fit for use because they were not thick enough. It was held by the House of Lords that, since this matter was not within the specifications, the buyer was therefore relying on the skill or judgment of the seller. According to Lord Sumner in *Medway Oil and Storage Co. v. Silica Gel Corp.* (1928),<sup>25</sup> reliance is a question of fact to be answered by examining all that was said or done with regard to the proposed transaction on either side from its first inception to the conclusion of the contract. The reliance in question must be such as to constitute a substantial and effective inducement which leads the buyer to buy.

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<sup>24</sup> [1934] AC 402.

<sup>25</sup> (1928) 33 Com. Cas. 195.

### (c) EXTENT OF SELLER'S LIABILITY

Section 14(3) imposes a duty on the seller to supply goods which were "reasonably fit for the particular purpose" required by the buyer. He does not promise to sell something which is absolutely suitable for the buyer's purpose, but something reasonably fit for the purpose needed by the buyer. When cars are the subject-matter of the sale, it must be accepted as "reasonably fit" if it goes "satisfactorily" as distinct from "perfectly". But if new cars develop major defects which are very annoying, such as the seizure of the engine every 100 miles or a broken throttle cable, that means that the car is far from being reasonably fit for its purpose. As regards second-hand vehicles, one might naturally expect a lower level of fitness because a used vehicle will not be as fit as a new one. Thus, the concept of "reasonable fitness" is a subjective one depending on the nature of the goods involved. In *Bartlett v. Sidney Marcus Ltd.* (1965)<sup>26</sup> a claim under section 14(3) was dismissed because the car was in usable condition even though not perfect and it was fit to be driven along the road in safety. Lord Denning said that "a buyer should realise that, when he buys a second-hand car defects may appear sooner or later and in the absence of an express warranty, he has no redress. Even when he buys from a dealer the most that he can require is that it should be reasonably fit for that purpose of being driven along the road". If, however,

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<sup>26</sup> [1965] 1 WLR 1013.

the condition of the vehicle is so defective so as to make it unfit to be driven on the road, then the court will not hesitate to say that there is a breach of section 14(3).<sup>27</sup>

What if the defects are those which do not really affect its function as a car? Will cosmetic defects entitle a claim under section 14(3)? It was suggested that factors which affect the merchantability of the goods will also affect its fitness.<sup>28</sup>

Once the elements of the section have been established, the seller cannot disclaim liability by saying that he was not aware of the defects or had already taken reasonable care to make sure the goods were fit. His duty is strict and this is seen in the case of *Frost v. Aylesbury Dairy Co.* (1905).<sup>29</sup> Here milk which was sold for family use was contaminated with typhoid germs. This fact was not discoverable by the naked eye and could only be detected by a scientific investigation. Despite this, the seller was held to be responsible for the breach of the implied condition of fitness.

The strict obligation of the seller is extended to cover not only goods actually bought by the buyer, but also containers and packages in which the goods were sold. The implied condition is breached even if there is a minor defect which could be easily

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<sup>27</sup> See *Crowther v. Shannon Motor Co.* [1975] 1 All ER 139.

<sup>28</sup> Atiyah, *Sale of Goods*, p. 187.

<sup>29</sup> [1905] 1 KB 608.

and cheaply rectified. In the case of *Parsons (Livestock) Ltd. v. Uttley, Ingham & Co.* (1978)<sup>30</sup> the seller supplied the buyer with an animal-food hopper for storing food for pigs. When it was supplied the seller failed to provide for proper ventilation. This had caused the food to be mouldy and when eaten by the pigs, they suffered intestinal disease and many died. It was held that despite the trivial defect which could simply be put right, there had been a breach of section 14(3).

In this case, the consequence of the breach was extensive because 254 pigs of the value of £10,000 died. The buyer also lost sales and turnover resulting in big financial loss. The total claim was £20,000 or £30,000. A question arises as to whether the seller will be held liable if the consequence of the breach is beyond foresight. The buyer was entitled to recover the actual loss but not loss of profits. In *Vacwell Engineering Co. Ltd. v. B D H Chemical* (1971)<sup>31</sup> the plaintiffs were manufacturers of plant and the defendants were manufacturers of chemicals. The plaintiffs were accustomed to getting supplies of chemicals from the defendants which usually contain warnings of industrial hazards. The plaintiffs requested the supply of a certain chemical to be used in manufacturing a plant and this was communicated to the defendants. The defendants supplied the plaintiffs with the chemical contained in glass ampoules, warning it to be "Harmful Vapour". The chemical, unknown to the parties,

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<sup>30</sup> [1978] QB 791.

<sup>31</sup> [1971] 1 QB 88.

was liable to explode in contact with water. The manufacture process required the ampoules to be washed in water to get rid of the labels and while that was done, there was a violent explosion, causing extensive damage to the plaintiffs' property. A claim was made for the damage and loss of profit suffered. It was held that the goods were not fit for the purpose for which they were bought. The defendants were liable to the extent that they ought to have foreseen that the chemical would come in contact with water, and they had not warned the plaintiffs of this fact.

### **(III) RELATIONSHIP BETWEEN SECTIONS 14(2) AND 14(3)**

Lord Diplock in the case of *Mash & Murrell Ltd. v. Joseph I. Emanuel Ltd.* (1961)<sup>32</sup> stated his opinion on the relationship between section 14(3) and section 14(2). He said:-

"Subsections (3) and (2) of section 14 of the Act are really two sides of the same coin. If a buyer makes known a particular purpose - those, of course, are the words of the subsection - to the seller so as to show that he relies on the seller's skill and judgement, then the suitability for that particular purpose is a warranty and implied condition of the contract. If he does not make known any particular purpose, then, the assumption being that he requires them for the ordinary purposes for

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<sup>32</sup> [1961] 1 WLR 862.

which such goods are intended to be used, the implied condition is one that they are fit for those ordinary purposes, that is to say, that they are merchantable, and I venture to think that there is no other distinction between subsection (3) and subsection (2)."

Between subsections (2) and (3) of section 14, there are some similarities, and to a certain extent they overlap. There are also differences. First, subsection (2) applies to the normal purposes of the goods and subsection (3) applies to a particular purpose which was made known by the buyer to the seller. Where the goods have only one purpose, and it is not fit for that purpose, that will amount to breach of both subsections. If the goods have more than one normal purpose, and it is fit for only one purpose, it is merchantable under subsection (2). But if it is fit for all the other purposes but not fit for the buyer's particular purpose, subsection (3) is breached.<sup>33</sup> The standard of protection is higher in subsection (3) because the buyer has made known to the seller the purpose for which the goods are bought and that he has relied on the latter's skill or judgement. If the buyer can bring himself under subsection (3), his chances of success are greater than if he claims under subsection (2). But, on the other hand, if there is no reliance or reliance is unreasonable, subsection (2) will be more appropriate.

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<sup>33</sup> See *Ashinton Piggeries Ltd. Christopher Hill Ltd.* [1972] AC 441; *Kendall v. Lillico* [1969] 1 AC 31; *Aswan Engineering Establishment Co. v. Lupdine* [1987] 1 WLR 1.



This brings us to the second difference between the subsections. In subsection (3) there must be reliance on the seller's skill or judgment, but this is not a requirement under subsection (2). Reliance may be rebutted when the buyer selects his own goods and examines them himself, or when reliance is unreasonable. So, when the buyer carries out the examination, subsection (3) will be excluded. But if he makes it clear to the seller that despite examining the goods himself, he still relies on the seller's skill or judgement, that partial reliance will give rise to liability under subsection (3). On the other hand, examination by the buyer will exclude subsection (2) because the proviso to it will be invoked, i.e. if the buyer examines and he fails to notice any defect which ought to have been revealed by that examination, subsection (2) will not be applicable. In instances where the defect is brought to the buyer's attention, both the subsections are excluded because their provisos become effective.<sup>34</sup> In subsection (3), knowledge of the defect on the part of the buyer makes it unreasonable for him to rely on the seller's skill or judgment.

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<sup>34</sup> Section 14(2)(a) "... As regard defects specifically drawn to the buyer's attention before the contract is made."

#### (IV) FITNESS FOR PURPOSE UNDER UNIFORM COMMERCIAL CODE AND VIENNA CONVENTION

Article 2-315 of the Uniform Commercial Code states that, implied warranty of fitness for a particular purpose arises where: (1) the seller has reason to know a particular purpose for which the buyer requires the goods; (2) the seller has reason to know that the buyer is relying on the seller's skill or judgment to select suitable goods; and (3) the buyer in fact relies on the seller's skill or judgment in purchasing the goods.<sup>35</sup> The seller must have reason to know of the buyer's particular purpose and the buyer's reliance. There is no need to prove actual knowledge. Therefore, particular purpose and reliance need not be explicit, but can be reasonably inferred from the circumstances.<sup>36</sup> In the case of *Vlases v. Montgomery Ward & Co.* (1967)<sup>37</sup>, Vlases purchased 2000 chickens from Montgomery Ward to start a chicken business. After receiving the birds, Vlases discovered that they were afflicted with avian leukosis, a bird cancer. Vlases sued Montgomery Ward for breaches of the implied warranties of merchantability and fitness for a particular purpose. Montgomery Ward claimed that the disease was not detectable in baby chicks, and that the chicks could have become ill after the sale. The court held that Montgomery Ward was responsible for breach of the

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<sup>35</sup> Metzger, et. al., *Business Law and the Regulatory Environment*, p. 834.

<sup>36</sup> *Ibid.*

<sup>37</sup> 377 F. 2d 846 (3d Cir 1967).

warranties. The reason is because, it is the purpose of the implied warranties to make the seller responsible for selling inferior goods. That the defect was difficult to discover is not an adequate defence. The law does not care what precaution the seller took. The issue is merely the quality of the goods provided to the buyer. The quality was inferior and there was no exclusion of the warranties, therefore the seller was liable.

Article 2-315 is imposed on any seller (not just merchant), but requires 2 elements; that the seller knew the particular purpose for which the goods were bought and the buyer relied on the seller to select the goods. Actual knowledge of the particular purpose is not required so long as the circumstances of the purchase are such that the seller should have reason to know the purpose. In *Catania v. Brown* (1967)<sup>38</sup>, the plaintiff entered the defendant's retail paint business and asked the defendant to recommend a paint to cover the exterior stucco walls of the plaintiff's house. The defendant was told that the stucco was in a "chalky" and "powdery" condition. The defendant advised the plaintiff to "wire brush" any loose particles which were "flaky" or "scaly" before applying any paint. The defendant recommended and sold to the plaintiff a paint known as Pierce's shingle and shake paint and told him to mix 2 – 3 gallons of paint in a container and to add a thinner. The plaintiff followed the instruction and five months after the date of the purchase, the paint on the exterior

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<sup>38</sup> 231 A.2d 668 1967.

walls of the plaintiff's house began to peel, flake and blister. The issue before the court was whether an implied warranty of fitness for a particular purpose exist? The court answered in the affirmative and said that in creating an implied warranty of fitness, the court acknowledge that two requirements must be met; (1) the buyer must rely on the seller's skill and judgment to select or furnish suitable goods and (2) the seller, at the time of the contracting must have reason to know the buyer's purpose. In every case it is a matter of fact whether these requirements are met. These facts exist in the case.

However, a claim would be unlikely to succeed if the buyer has more expertise than the seller, or he has submitted the detailed specifications of the goods he wishes and he actually selects the goods himself. In *Lewis and Sims, Inc. v. Key Industries, Inc.* (1976)<sup>39</sup> the plaintiff, a contracting corporation, was installing a water sewer system in the town of North Pole, Alaska. It ordered pipe stating only the size and quantity of the pipe and that the pipe be "coal tar enamel lined". The pipe which were supplied could not withstand the intense cold and before the pipelines could be constructed, the enamel lining had pulled away from the pipe. Because of this it was rejected, and the plaintiff had to purchase other pipe. The plaintiff sued the defendant for damages for breach of the implied warranty of fitness for a particular purpose. In the first instance, judgment was given in favour of the plaintiff. The defendant appealed. The appeal court reversed the decision of the trial judge and found that on the facts of the case, there had been no reliance by the plaintiff on the skill and judgment of the defendant.

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<sup>39</sup> 16 Wash App 619, 557 P2d 1318 (1976).

The court found that the plaintiff had ordered a specific size and type of pipe and any deviation from the coal tar enamel lined pipe that was manufactured would not have been accepted. In short, neither was the defendant asked for its recommendations, nor did it select the pipe or lining to be used. Reliance upon the seller's skill and judgment had not been manifested.

As mentioned above, under the American law, the warranty of fitness, does not require that the seller must be a merchant. When the seller warrants fitness, he impliedly promises that the goods will be fit for the buyer's particular purpose, not the ordinary purposes for which such goods are used.<sup>40</sup> In this aspect the American law is better compared to the English law which confines this implied warranty to a seller who sells in the course of business, and that makes him a merchant.

Under the Vienna Convention, fitness for particular purpose is found in Article 35(2)(b). It states that goods do not conform with the contract unless they are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill or judgment. This is similar to the American and English laws, where the buyer should inform the

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<sup>40</sup> *ibid.*

seller the particular purpose for which the goods were required. The communication should be made before the conclusion of the contract.

## **(V) CONCLUSION**

Section 14(3) and section 14(2) overlap where goods are bought for their normal purpose and they are not fit for this purpose. Both the conditions of quality and fitness are broken and the buyer can plead breach of both conditions. In *Aswan Engineering Establishment Co. v. Lupton Ltd.* (1987),<sup>41</sup> the Court of Appeal held that goods which have more than one normal purpose will be merchantable if they are fit for any one of their normal purposes. But if the buyer wants the goods for a particular purpose, he must make that known to the seller before he can rely on section 14(3).

With the passing of the 1994 Act, section 14(2) is given a wide interpretation. Goods are merchantable if they are "fit for all the purposes for which goods of the kind in question are commonly supplied". So, where a buyer buys for a particular purpose but does not specify that purpose to the seller, he can rely on section 14(2) if the goods are not fit for his purpose; provided that the particular purpose is one of the normal purposes of the goods.

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<sup>41</sup> [1987] 1 All ER 135.



Given the wide scope of section 14(2), can we do away with section 14(3)? The answer is no, because these two subsections overlap only in cases where the buyer buys for a normal purpose. But if he requires the goods for an unusual purpose, section 14(2) has no application. He still has to fall back on to section 14(3). He has to inform the seller of the unusual purpose to show reliance on the seller's skill and judgment and rely on section 14(3). For this reason, the Law Commissions opined that the overlap was immaterial.<sup>42</sup> Different aspects of fitness are covered by the two subsections.

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<sup>42</sup> Law Commissions' Report No. 160, para. 2.19.

## **CHAPTER SIX**

### **EXEMPTION CLAUSES**

#### **INTRODUCTION**

It is a common practice for one of the parties to a contract to insert or introduce into the contract clauses purporting to avoid, limit or restrict the legal rights, duties, liabilities and remedies which might otherwise arise. Such clauses are introduced by the proferens, the one who purports to rely on it, in order to exclude or limit his liabilities or obligations that would otherwise accrue to him. An example is a clause that excludes conditions, warranties or other undertakings which would usually be implied in favour of the other party. In sale of goods, it would be the seller who would insert an exemption clause to exclude the implied terms favouring the buyer. This chapter consists of a discussion on the development, effectiveness and the limitations on exemption clauses in sale of goods. A comparison will be made with the American law as well as the Vienna Convention.

#### **(I) DEVELOPMENT OF THE LAW ON EXEMPTION CLAUSE**

Under the Sale of Goods Act 1893, there was a wide freedom for the seller to contract out of the implied terms contained in the Act. Sections 12 to 15 contained words that had the effect that an express agreement could exclude the implied terms. There was

also the general provision for contracting out in section 55. This unlimited right of contracting out was one of the issues considered and reported by the Law Commissions in their 1969 joint report on the amendments to the Sale of Goods Act 1893.<sup>1</sup>

Among the proposals of the Law Commissions were:-

(1) The contracting out of the implied term of title in section 12 should be banned or prohibited in all sales because, if this was allowed, there would be no sale. In every contract for the sale of goods, there is the transfer of title from the seller to the buyer. The Law Commissions found that there was no justification to exclude or vary the implied condition of title, except where it was clear that the seller was purporting to sell only a limited title.

(2) In relation to the implied terms in sections 13 and 14, exclusions would be banned in "consumer sales".

The meaning of a "consumer sale" was defined<sup>2</sup> as a sale of goods (other than a sale by auction) by a seller in the course of a business where the goods -

(a) Are of a type ordinarily bought for private use or consumption; and

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<sup>1</sup> Law Commissions' Report No. 24, 1969.

<sup>2</sup> Appendix A.

(b) Are sold to a person who does not buy or hold himself out as buying them in the course of a business for one of the purposes mentioned below.

The said purposes were:-

- (a) Disposing of the goods by way of sale, hire or hire-purchase in the course of the buyer's business;
- (b) Consuming or processing them in the course of that business;
- (c) Using them for providing a service which it is an object of that business to provide.

A distinction was made between a private consumer and a business consumer. Purchases by private consumers of goods of a type ordinarily bought for private use or consumption would be protected. Business buyers of consumers goods were divided into two types; (1) those who bought for the purposes listed in (a), (b) and (c) above, and (2) those who were not in the business of dealing in or with the goods purchased.<sup>3</sup> To the first category of people, the proposed ban would not apply, while the second would be, *prima facie*, entitled to the benefit of the proposed ban.

Since the proposed ban would not affect commercial sales, the Law Commissions thought that there must be some form of more general control over the use of

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<sup>3</sup> Law Commissions' Report No. 24, p. 33.

exemption clauses. The question before the Law Commissions was whether there should be a general control of exemption clause in commercial sales. There were many arguments against and for the general control in business sales. One of the arguments against it was that the law should not interfere with the freedom to contract, which is the fundamental principle of our commercial law, unless it has led to injustice and unfairness.<sup>4</sup> On the other hand, the argument for the general control was that, besides protecting the private consumer, the law should also protect small retailers. They had no strong trade associations to strengthen their bargaining power against the established manufacturers or suppliers. Therefore, they were in the same position as an individual consumer.<sup>5</sup> The Law Commissions came to a conclusion and recommended that an exemption clause would be allowed only if it is fair and reasonable.

As mentioned in the earlier chapters, the recommendations made by the Law Commissions were embodied in the Supply of Goods (Implied Terms) Act 1973, which applied to sale of goods and hire-purchase transaction. Besides re-modelling the implied terms in sections 12 to 14, the Act amended section 55 of the Sale of Goods Act 1893. It contained comprehensive provisions, prohibiting and limiting the power of the seller or the owner, to exclude the implied terms. Any term which aimed at

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<sup>4</sup> Para. 108.

<sup>5</sup> Para. 109.

excluding section 12 should be void in all sales. An exemption clause to exclude sections 13 and 14 would be void in consumer sales, but not in commercial sales, if it is reasonable.

In other types of transactions, like contracts of hire, contracts for work and materials and contracts for exchange, the control was not applicable. The Law Commissions in their 1975 Joint Report proposed to extend the control of exemption clause to these types of contracts.<sup>6</sup> Control should be extended because there was no reason to treat these contracts differently. For example, A took a car on hire-purchase. In the agreement, the owner excluded the implied terms of quality and fitness. After using the car, it was found to be defective. A could sue the owner for breach of these conditions and the exemption clause could not protect the owner because it was a consumer sale. Presume that A hired the car. The exemption clause would be valid because the law had no control over exemption clauses in contracts of hire.

The Commissions recommended the same protection as the amended Sale of Goods Act 1893, but with this definition of a consumer transaction:-

"It is a consumer transaction if:

(1)The person supplying the goods contracts in the course of business;

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<sup>6</sup> Law Commissions' Report No. 69, 1975.



- (2) The person for whom the goods are supplied is not contracting and does not hold himself out as contracting in the course of a business; and
- (3) The goods are of a type ordinarily supplied for private use or consumption.

The onus of proving that a contract is not a consumer transaction should lie on the party so contending.

Based on the 1975 Report, the Unfair Contract Terms Act 1977 was passed. This Act dealt with unfair exemption clauses rather than unfair impositions of liability.<sup>7</sup> Under the 1973 Act, the question was whether it was fair and reasonable to rely on the exemption clause. Under the 1977 Act, the question was whether the term itself was fair and reasonable. By section 6(1) in England and Wales, and section 20(1) in Scotland, liability in respect of breach of section 12 of the Sale of Goods Act 1893 could not be excluded or restricted by any contract term. Any attempt to include such clauses in order to exclude liability will be void.

Section 6(2) and (3) in England and Wales, and section 20(2) in Scotland, deal with implied conditions of description, quality and sample. Section 6(2) provides that:-

"(2) As against a person dealing as a consumer, liability for breach of the obligations arising from-

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<sup>7</sup> See Atiyah, *Sale of Goods*, p. 229.

(a) section 13, 14 or 15 of the Sale of Goods Act (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);

(b) section 9, 10 or 11 of the 1973 Act (the corresponding thing in relation to hire-purchase)

cannot be excluded or restricted by reference to any contract term.

(3) As against a person dealing otherwise than as consumer, the liability specified in subsection (2) above can be excluded or restricted by reference to a contract term, but only insofar as the term satisfies the requirement of reasonableness."

Section 20(2) provides:-

"Any term of a contract which purports to exclude or restrict liability for breach of the obligation arising from -

(a) section 13, 14 or 15 of the Sale of Goods Act (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);

(b) section 9, 10 or 11 of the 1973 Act (the corresponding provisions in relation to hire-purchase),

shall

(i) in the case of a consumer contract, be void against the consumer;

(ii) in any other case, have no effect if it was not fair and reasonable to incorporate the term in the contract.”

Thus, under section 6(2) and section 20(2), there could never be a contracting out of seller’s duties under sections 13 – 15 “against a person dealing as consumer”. A “consumer” is defined in section 12 and section 25(1) of the Act. In section 12, a party to a contract “deals as consumer” in relation to another party if :-

- (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
- (b) the other party does make the contract in the course of a business; and
- (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

Section 25 in Scotland had a slightly different wording. It refers to "consumer contract" rather than "dealing as a consumer". A "consumer contract" means a contract (not being a contract of sale by auction or competitive tender) in which -

- (a) one party to the contract deals, and the other party to the contract ("the consumer") does not deal or hold himself out as dealing, in the course of a business, and
- (b) in the case of a contract such as mentioned in section 15(2) of this Act, the goods are of a type ordinarily supplied for private use or consumption."

Therefore, a party "deals as a consumer" or effects a "consumer contract", where three conditions are satisfied. First, he neither makes the contract in the course of a business nor holds himself out as so doing. Second, the other party dealing with the alleged consumer must have himself contracted in the course of business. And finally, the goods, where the contract is one of sale, hire-purchase or covered by section 7 or 15(2) of the Act<sup>8</sup> must be of a type "ordinarily supplied" for private use or consumption.

Having given a definition to the word "consumer", did not mean that all problems were solved. There were still some problems and sometimes odd results were arrived at with this definition of "consumer".<sup>9</sup> Firstly, a "consumer" can be a private company purchasing goods for the use of its members. Even though the company is buying for a business purpose, it is in actual fact a consumer sale. In the case of *R & B Customs Brokers Co. Ltd. v. United Dominions Trust* (1988)<sup>10</sup> the plaintiff company bought a car from the defendants for the use of one of its directors. In the contract there was a clause which excluded the implied conditions that the car should be merchantable and fit for the buyer's purpose. When the car turned out to be defective, the plaintiff

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<sup>8</sup> Section 7 and section 21 apply to all contracts under which. Or in pursuance of which, possession or ownership of goods passes but where the law of sale of goods or hire-purchase is not applicable. Therefore it applies to contracts for the hire or lease of goods.

<sup>9</sup> Atiyah, op. cit., p. 219.

<sup>10</sup> [1988] 1 All ER 847.

company sought to reject it. The defendant purported to rely on the exemption clause and argued that the plaintiff was not dealing as a consumer, since the car was bought in the course of the plaintiff company's business. The Court of Appeal held that the plaintiff company was dealing as a consumer and not in the course of a business. Therefore, the exemption clause was void. To qualify as dealing in the course of a business, the transaction must form an integral part of the business or there was a degree of regularity of similar transactions. On the facts of the case, the purchase of the car was not an integral part of the business nor was there sufficient regularity. The plaintiff had only bought two or three cars on similar terms.

This decision was criticised as being odd because it appears to open a gap between the protection offered to consumers by section 5 and the other sections of the 1977 Act.<sup>11</sup> Under section 5, a clause in a guarantee is not effective if the goods prove defective whilst "in consumer use". "In consumer use" means use other than in the course of a business. So, if the car in the above case had been used only for the purposes of the company, it would not have been in "consumer use" for the purpose of section 5, but the company would still have bought as a "consumer" for the purpose of section 6.<sup>12</sup> It was thought that it would be better if the company was held to be in the

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<sup>11</sup> Bradgate and Savage, **Commercial Law**, p. 47.

<sup>12</sup> *Ibid.*

course of a business, and to decide on the reasonableness of the clause. Factors like the company's lack of expertise and bargaining power would be taken into account.<sup>13</sup>

Secondly, if there are several buyers, the position of each buyer must be looked at individually. Thirdly, if the party bought the goods as a consumer, then there was a novation under which a business party takes over the consumer's rights under the contract, the business succeeds to all the rights of the consumer.<sup>14</sup> A novation is where the contract between two parties is rescinded in consideration of a new contract being entered into on the same terms between one of the parties and a third party. So, a novation by a consumer entitles a business third party to all the benefits of the consumer. In the case of *Rasbora Ltd. v. JCL Marine Ltd.* (1976)<sup>15</sup> there was a sale by the defendants of a power boat to one Mr. Atkinson, who owned all the shares in the plaintiff company, i.e. Rasbora Ltd, which was incorporated in Jersey. It was contemplated on both sides that the true purchaser of the boat would not be Mr. Atkinson, but a buyer the sale to whom would not attract V.A.T. This meant that the actual buyer had to be a non-U.K resident. It was mutually understood that Rasbora was to be substituted for Mr. Atkinson as the buyer. After the boat was delivered, within 27 hours of the delivery, it was totally destroyed in a fire due to electrical

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<sup>13</sup> *ibid.*

<sup>14</sup> Atiyah, *op. cit.*, p. 219.

<sup>15</sup> [1976] 2 Lloyd's Rep. 645.



defects. There was a clause in the agreement that excluded the implied conditions of merchantability and fitness. Among the issues before the court were; (a) were Rasbora Ltd. parties to the original contract by novation? (b) If so, was the contract between Rasbora Ltd. and defendants subject to the exclusion clause? This involved the question of whether it was a consumer sale or a non-consumer sale. The court held that Rasbora Ltd. were parties by novation to the contract originally made between Mr. Atkinson and the defendants. The exclusion clause was not effective because the sale was a consumer sale and the implied condition that the boat should be of merchantable quality could not be excluded.

The decision of Lawson J. was criticised on two points.<sup>16</sup> First, when there is a novation, a new contract is created. Therefore, there could not be the automatic shift of the rights and duties of the parties. Secondly, the judge said that even if Rasbora Ltd. were to be the original buyers, it would still be a consumer sale because the boat was to be used by the majority shareholder and not to be chartered to third parties. It was submitted that this was incorrect because under section 12 of the Unfair Contract Terms Act 1977 both the purpose for which the goods are bought and the identity of the persons using the goods are immaterial for a sale in the course of a business.<sup>17</sup> It

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<sup>16</sup> Ian Brown, "Business and Consumer Contracts", 1988 *Journal of Business Law*, p. 386.

<sup>17</sup> *Id.* p. 393.

was, however, stated in obiter that even if the sale was not a consumer sale, the clause would not have been a "fair and reasonable" one.

## **(II) EFFECTIVENESS OF CONTROL OF EXEMPTION CLAUSE**

Even though the provisions in the Act 1977 envisage no contracting out in consumer cases, you can still contract out in other cases. According to Atiyah, the framing of the Unfair Contract Terms Act did not prevent the intention of the parties to control liability under these sections.<sup>18</sup> For example, where specific good is sold by description, it need not necessarily be sale by description under section 13 if the seller intended it not to be so. Similar problems may arise with regard to the other implied terms. Implied conditions of merchantable quality can be ousted despite the Unfair Contract Terms Act if the seller draws the attention of the buyer to the defects or requires him to inspect the goods. And as for the fitness term, it can be avoided by the seller, even though the purpose has been made known to him and there has been reliance, by him giving no guarantee that the thing sold would fit for the buyer's particular purpose.<sup>19</sup>

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<sup>18</sup> Atiyah, *op. cit.*, p. 220.

<sup>19</sup> *Id.* p. 222.

By virtue of sections 6 and section 20 of the Unfair Contract Terms Act 1977 in England and Wales and Scotland, respectively, any provision in a consumer sale which purports to exclude liability under the implied terms of the Sale of Goods Act is simply void or effect. But the Act does make certain provisions in a non-consumer contract effective if they are fair and reasonable. The basic test of reasonableness is set out in section 11(1), which says that, "the term shall have been a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

In Scotland, a similar provision is in section 24 which says that, "whether it was fair and reasonable to incorporate a term in a contract, regard shall be had only to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties to the contract at the time the contract was made." The circumstances which were referred to by both sections serve as guidelines in deciding on the issue of reasonableness. These guidelines are found in Schedule 2 as follows:-

- (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
- (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

- (c) whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regards, among other things, to any custom of the trade and any previous course of dealing between the parties);
- (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
- (e) whether the goods were manufactured, processed or adapted to the special order of the customer.

Reasonableness is also a relevant consideration in determining the validity of other terms expressed in the contract. In England and Wales, section 3(2) of the Unfair Contract Terms Act provides that the person who deals with the consumer or on his own written standard terms of business cannot by reference to any contract term:-

- (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
  - (b) claim to be entitled,
    - (i) to render a contractual performance substantially different from that which was reasonably expected of him, or
    - (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,
- unless the term satisfies the reasonableness test.

In Scotland, a similar provision is found in section 17(1) which applies to any term in a consumer contract and to standard form contracts. The section applies a fairness and reasonableness test to clauses excluding liability to the consumer or customer in respect of a breach of a contractual obligation.

There are many cases dealing with the issue of reasonableness of clauses. In *R.W. Green Ltd. v. Cade Bros Farms* (1978)<sup>20</sup> there was a contract of sale of seed potatoes by potato merchants and a farming business. In that contract terms were included insisting that complaints be made within three, or sometimes seven, days and damages were limited to the extent of the contract price only. It was held in this case that the latter clause was reasonable on the ground that the form of contract had been in use for many years with the approval of the trade associations representing both parties. Also it was reasonable because the potatoes were cheaper for they were uncertified. However, as regards the other clause which limited the time for claim, it was held to be unreasonable because it was reckoned impractical to complain about a particular defect which may be latent, within the prescribed time.

In *George Mitchell v. Finney Lock Seeds* (1983)<sup>21</sup> the *Cade* case was distinguished. In this case the plaintiffs were farmers and they ordered from the

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<sup>20</sup> [1978] 1 Lloyd's Rep. 602.

<sup>21</sup> [1983] QB 284.

defendants, who were seed merchants, late cabbage seed. The defendants supplied them with inferior seed which were indeed not late cabbage seed. The plaintiffs suffered considerable losses which were not purely economic losses. The losses included wasted expenditure in planting and clearing the land after the crop failure. The contract stipulated that "In the event of any seeds sold .... by us not complying with the express terms of the contract of sale .... or any seeds ..... proving defective in varietal purity we will .... refund all payments made to us by the buyer in respect of the /seeds .... and this shall be the limit of our obligation. We hereby exclude all liability for any loss or damage arising from the use of any seeds .... supplied by us and for any consequential loss or damage arising out of such use .... or any defect in any seeds supplied by us or for any other loss or damage whatsoever save for the refund as aforesaid." The House of Lords held that the clause was unreasonable. The House balanced several factors, including the relative bargaining strength of both parties, the opportunity to buy seeds without the limitation of liability, the ease and cheapness of insurance available to the defendants, and the defendants' negligence.

In the case of *R & B Customs Brokers Co. Ltd. v. United Dominions Trust* (1988),<sup>22</sup> although it was held that the buyers were consumers, and therefore reasonableness would not arise, the court was inclined to think that even if it was a non-consumer sale, the clause would have been reasonable. The reason is because the

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<sup>22</sup> [1988] 1 All ER 847.



sellers were mere financiers who had never seen the car, and the buyers were themselves business people who had commercial experience. If this was their view, then it would mean that financier sellers in a credit sale could exempt themselves from liability. This would have made nothing of the Hire-Purchase legislation which intended to impose liability on financiers as though they were sellers.<sup>23</sup>

The question of whether the exemption clause is reasonable or not is a question of fact depending on the circumstances of the case. In *Howard Marine & Dredging Co. Ltd. v. A. Ogden & Sons Ltd.* (1978)<sup>24</sup> Lord Denning considered the following factors to be relevant: the parties were of equal bargaining power, the representation was innocent and the plaintiffs could have discovered the truth themselves on further inquiry. The majority of the court held that the clause was unreasonable but they did not give their reasons. All that was said was that, the matter was one of discretion for the trial judge, who was entitled to find the clause unreasonable. Similarly in the case of *Walker v. Boyle* (1982),<sup>25</sup> the clause was held to be unreasonable but no reasons were offered.

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<sup>23</sup> Atiyah, *op. cit.*, 233.

<sup>24</sup> [1978] QB 574.

<sup>25</sup> [1982] 1 WLR 495.

There are also many cases in Scotland on the Unfair Contract Terms Act 1977. In *Border Harvesterd Ltd. v. Edwards Engineering (Perth) Ltd.* (1983)<sup>26</sup> the buyer had bought a drying machine from the seller. In the sale agreement it was expressly mentioned that the machine should be of a certain capacity. There was also an express term limiting the liability of the seller for failure to supply equipment fit for the purpose of drying (i.e. condition 18). The issue is whether section 20(2) could be relied upon to negate the effect of condition 18. It was held by the court that section 20(2) would not apply because these obligations had arisen from the express terms, as such they would not be subjected to the protection under section 20(2) of the Unfair Contract Terms Act 1977. As such, it is not necessary to prove that condition 18 is fair and reasonable. If there had not been any express provision as to the description of the goods or its quality, then these terms would be implied by the Sale of Goods Act and may be section 20(2) would apply. On the facts of this case may be the buyer should have relied on section 17 of the Unfair Contract Terms Act which applies to any term in a consumer or a standard form contracts.

The question of fairness and reasonableness was considered in the case of *Macrae & Dick Ltd. v. Philip* (1982).<sup>27</sup> The pursuers sold a Rolls-Royce Silver Shadow motor-car to the defender. The agreement was concluded in September 1978 but

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<sup>26</sup> 1983 SLT 128.

<sup>27</sup> 1982 SLT (Sh Ct) 3.

delivery was made in March 1979. Upon payment of the price the defender signed an undertaking to offer the car to the pursuers at a price not exceeding 90 percent of the purchase price in the event that he decided to sell the car within twelve months of purchase. Five days before the signing of the undertaking the defender had in fact already resold the car to a third party. This action was brought by the pursuers to claim damages for the resale by the defender. The cause of action was for breach of contract, in particular, breach of the undertaking contained in the pre-emption clause. The defender relied on section 17 contending that the pursuers were endeavouring to render a performance of the contract substantially different from that which the defender reasonably expected; therefore the pre-emption was of no effect. The court held that section 17 purports to invalidate any condition of a consumer contract which would enable "a party to the contract" to implement his performance by rendering something substantially different from that which the other party (the consumer) could reasonably have expected from the contract, unless it was fair and reasonable. However on the facts of the case, the court found that the defender had an option whether or not to sign the letter and further obligate himself. He could have refused to accept this additional obligation and if the pursuers refused to deliver the car, he could have held them in breach of contract and terminate the contract and sue them for damages. But instead the defender chose to sign the letter and he was not able to implement his undertaking because he had already re-sold the car. Given that the defender had the option, it could not be said that it was not fair and reasonable for the pursuers to introduce the obligation into the contract.

The next thing to consider is who has the onus of proving that the clause is fair and reasonable. In *Landcatch Ltd. v. Marine Harvest Ltd.* (1985)<sup>28</sup> the pursuers raised section 20(2) when the fish bought by them from the suppliers turned out to be unmerchantable. They sued the suppliers for damages for breach of contract. In their defence the suppliers sought protection from clause 7 in the agreement, which provided inter alia that "all warranties and conditions, express and implied, statutory or otherwise, as to quality or fitness for any purpose of the goods are expressly excluded....." There was also the requirement that the buyers should notify the supplier in writing of any defects within five days of delivery. The suppliers averred that the pursuers failed to give the notice within the specified time, therefore failed in their claim. In answer to this averment the pursuers averred that the provision was not fair and reasonable and therefore not enforceable. The issue herein is who bears the burden of proving the fairness and reasonableness of the clause. The court held that the burden is on the suppliers to prove that the provision was fair and reasonable to be incorporated in the contract.

When deciding whether the clause is fair and reasonable factors listed in Schedule 2 would be relevant. In *Denholm Fishselling Ltd. v. Anderson* (1991),<sup>29</sup> para (a) of

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<sup>28</sup> 1985 SLT 478.

<sup>29</sup> 1991 SLT 24.

Schedule 2 was relied upon by the buyer. Para (a) provides that the strength of the bargaining positions of the parties relative to each other, taking into account, inter alia, alternative means by which the customer's requirements could have been met. In this case, the defender bought eleven boxes of cod from the pursuers. After the sale the fish were found to be unfit for human consumption. The defender refused to pay the price on the ground they were not merchantable. The pursuer on the other hand alleged that the implied term under the Sale of Goods Act had been excluded by clause 6 of the contract. This clause provides that "buyers shall be afforded reasonable opportunity to examine all the fish exposed for sale and shall be held to have satisfied themselves, before completion of the transaction, as to their condition, weight and quantity, and in every other respect". The defender claimed that the clause is ineffective because it was not fair and reasonable, taking into account these factors:-

- (a) the pursuers had the monopoly, in the sense that they all contract on the standard conditions of sale, i.e. there was an unequal bargaining power between the parties;
- (b) it was not practical to make an exhaustive examination of the fish before the sale, therefore it was not fair to deprive the buyer of this remedy under the Sale of Goods Act.

The court disagreed with the defender's arguments and held that the pursuers did not have the monopoly because the buyers are not forced to buy fish from a single fish salesman. Secondly, due to the nature of the business and fish being perishable item,

the transaction has to be carried speedily. If items are found to be defective thereafter it may be difficult to prove when does the defect exist. It is equally difficult to prove whether the consignment in question was bought in a particular transaction. To eliminate such difficulty would make clause 6 a fair and reasonable one to be included.

This decision was criticised by Stewart who said that even though there was no monopoly as such, being a cartel the sellers were in a better position than the buyer. He also said that the fear of the difficulties expressed by the judge is not necessarily a realistic fear. And even if there is such a difficulty, that could not justify an unfair and unreasonable provision.<sup>30</sup>

In the most recent case of *Knight Machinery (Holdings) Ltd. v. Rennie* (1995)<sup>31</sup> the court was again called to decide on the fairness and reasonableness of a clause in a contract of sale. The subject-matter of sale was a printing machine, bought by the buyer, Rennie, from the seller, Knight Machinery. Rennie failed to pay for the price whereupon this action was brought against him. Rennie counterclaimed that the machine was not merchantable and was entitled to damages. In the sheriff's court it was held that the goods were not merchantable, but Rennie was excluded from rejecting them by virtue of clause 5 in the agreement. That clause imposed an

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<sup>30</sup> Stewart, "15 Years of Fair Contracts in Scotland", 1993 SLT (News) 15.

<sup>31</sup> 1995 SLT 166.



obligation on the buyer to inspect the goods within seven days from his receipt of them and unless the buyer gives notice in writing within that time, he shall be deemed to have accepted the goods and to have lost the right to reject them for any reason including any condition implied by the Sale of Goods Act 1979. Rennie appealed to the sheriff principal who held that clause 5 was not operative because it was not fair and reasonable. The term "notice" means notice that the goods were "defective which would entitled them to reject and this kind of notice could have been discovered within seven days". The appeal was allowed. Knight Machinery appealed to the Sessions Court. The issue on appeal was whether clause 5 was reasonable and fair. The judge held that the clause was ambiguous and that it is not clear what kind of notice should it be. To a certain extend the judge was in agreement with the sheriff principal that the notice should be of the defects which would give the rights to the buyer to reject the goods on the ground of unmerchantability. Such defects could not have been discovered within the short period of seven days. Although minor problems were encountered within this period, they were not uncommon bearing in mind that it is a new machine to be handled by the buyer. So based on the guidelines found in Schedule 2 and on sections 20(2) and 24 of the Unfair Contract Terms Act 1977, the appeal was dismissed.

In 1993 there was a Directive from the Council of the European Communities on unfair terms in consumer contracts.<sup>32</sup> The purpose of the Directive was to approximate the laws, regulations and administrative provisions of the member states relating to unfair terms in contracts concluded between a seller or supplier and a consumer.<sup>33</sup> This is aimed at protecting consumers against continued use of unfair terms in contracts between consumers and sellers or suppliers. What is meant by an "unfair term" is defined in Article 3 as a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. A term which has been drafted in advance and included in the seller's standard form agreement will be regarded as not individually negotiated because the consumer has no opportunity to influence the substance of the term.<sup>34</sup> What can be included under the heading of "unfair term" is the exemption clause because of these reasons:-

- (1) It is more in favour of the seller, who purports to rely on it, but detrimental to the consumer, thus creating an imbalance of rights and obligations of the parties.

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<sup>32</sup> Council Directive 93/13/ EEC.

<sup>33</sup> Article 1.

<sup>34</sup> Article 3(2).

(2) An exemption clause is usually not individually negotiated because it is always included in the seller's standard form contract.

(3) Because it has already been included in the standard form, the buyer has no opportunity to influence the way the clause is drafted.

Article 6 provides that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer. But the contract shall continue to be binding on the parties upon those terms if it is capable of continuing in existence without the unfair terms.

The EEC Directive had been adopted in the United Kingdom by virtue of the Unfair Terms in Consumer Contracts Regulations 1994. This statute came into effect on 1st. July 1995. The Regulation applies to "any term in a contract concluded between a seller or supplier and a consumer where the said term has not been individually negotiated".<sup>35</sup> Regulation 2 defines a "seller", a "supplier" and a "consumer". A "seller" is a person who sells goods and who, in making a contract to which these Regulations apply, is acting for purposes relating to his business. A "supplier" is a person who supplies goods or services and who, in making a contract to which these Regulations apply, is acting for purposes relating to his business. A "consumer" is defined as a natural person who, in making a contract to which these Regulations

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<sup>35</sup> Regulation 3(1).

apply, is acting for purposes which are outside his business. The word "business" includes a trade or profession and the activities of any government department or local or public authority.

The Regulations do not have the effect of amending or abrogating the Unfair Contract Terms Act 1977. They co-exist with each other with some differences between them. These differences are:-

- (a) The Regulations apply to terms in a contract with consumer, but the 1977 Act applies to both consumer and non-consumer (or commercial) contracts.
- (b) The word "consumer" as defined in Regulation 2 is confined to natural person, but under the 1977 Act the word includes a company or firm which does not deal in the course of a business. (See *Rashboro Ltd. v. J.C.L Marine Ltd.* (1977).<sup>36</sup>)
- (c) Under the Unfair Contract Terms Act an exemption or limitation of liability clause would be automatically void in respect of consumer transaction. In non-consumer sale its validity is subject to the fair and reasonable test. Under the Regulations this does not happen because the term would be subject to the unfairness term.
- (d) The Unfair Contract Terms Act is largely concerned with the exclusion or limitation of liability in contracts for sale or transfer of goods, of services and

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<sup>36</sup> [1977] 1 Lloyd's Rep. 645.

for services. The Regulations on the other hand apply to a wider scope with a few exceptions in Schedule 1.

(e) The Unfair Contract Terms Act strikes at exemption or limitation of liability clauses which are not fair and reasonable. The Regulations however, strikes at any term which is unfair. An "unfair term" means any term which contrary to the requirement of good faith causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.(Regulation 4(1)). Assessment of good faith takes into account factors listed in Schedule 2, namely:-

- the strength of the bargaining positions of the parties;
- whether the consumer had an inducement to agree to the term;
- whether the goods or services were sold or supplied to the special order of the consumer; and
- the extend to which the seller or supplier has dealt fairly and equitably with the consumer.

The first three factors can be found in Schedule 2 of the Unfair Contract Terms Act. These factors are not exclusive or exhaustive. They are mere guidelines.

Whether a term is unfair or not is subject to taking into account the nature of the goods or services for which the contract was concluded and referring to all

circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.(Regulation 4(2)).

### **(III) UNIFORM COMMERCIAL CODE AND UN CONVENTION**

At this point in the chapter, we turn to discuss the exemption clauses under the Uniform Commercial Code in the United States of America. American texts refer to exemption clause as liability disclaimer clauses. A product liability disclaimer is the seller's attempt to avoid liability for defective goods by including a term to that effect in the sales contract.<sup>37</sup> The basic argument for enforcing disclaimers and allowing the seller to escape liability is freedom of contract. This is however illusory in purchases by ordinary consumers. In such cases, the disclaimer appears in the seller's standard form and the consumers either "take it or leave it". There is in actual fact little bargaining equality between the parties.

Article 2-316(2) of the Uniform Commercial Code allows disclaimers for the implied warranty of merchantability and fitness for a particular purpose. Article 2-316 provides:-

"(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and

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<sup>37</sup> Metzger, et. at., **Business Law and the Regulatory Environment**, p. 843.



in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be in writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."

From the provision quoted above, to exclude or modify the implied warranty of merchantability is ineffective unless it (1) mentions the word merchantability and (2) is in a conspicuous writing. To exclude or modify the implied warranty of fitness for a particular purpose, the seller must (1) use a writing and (2) make the disclaimer conspicuous. To satisfy the conspicuous requirement, it is sufficient if the seller uses capital letters, larger type, contrasting type or contrasting colours.

These restrictions, however, do not apply if under paragraph (3), the contract uses "language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." The seller can

disclaim by using words like "as is", "with all faults" and "as they stand". Since these terms are usually used in reference to second-hand goods, they may be ineffective as disclaimers if new goods are sold and where products are sold to an ordinary consumer.<sup>38</sup>

At a glance it seems that American law allows a seller to disclaim liability for the implied warranty of quality and fitness. Is there no control over this right of the seller? There is such a control and it is found under Article 2-302 of the Code. The Article provides:-

"(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of the unconscionable clause as to avoid any unconscionable result."

In the case of *FMC Finance Co. v. Murphree* (1980)<sup>39</sup> FMC Finance leased six buses to a company, of which the Murphrees were the stockholders. They acted as guarantors under the lease agreement and undertook to pay if the company defaulted under the lease. In the lease agreement there was a liability disclaimer clause. The

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<sup>38</sup> Id. p. 844.

<sup>39</sup> 632 F. 2d. 413 (5<sup>th</sup>. Cir. 1980).

buses were later found to be defective and the company returned them to FMC Co. FMC re-sold the buses and claimed from the Murphrees the difference between the amount due under the lease and the amount realised after the sale. In their defence, the Murphrees argued that FMC Co. was in breach of the implied warranties of merchantability and fitness. But FMC Co., on the other hand, said that these warranties had been excluded in the lease. At the first instance in the district court it was held that the disclaimer was valid. Murphrees appealed. On appeal, the decision of the lower court was affirmed. The judge found that the liability disclaimer clause was conspicuous enough to catch the attention of the Murphrees and they, being business persons themselves, ought to have notice of this. It was further held that the clause was not unconscionable because the Murphrees should have noticed it. They were protected from unexpected and unbargained for disclaimers. The fact that they did not actually read the lease did not render the disclaimer invalid.

In the case of express warranty of description, liability is not easily disclaimed. This is because it would be unreasonable that the seller would exclude with one hand what he had freely and openly promised with the other. When you have an express warranty on one hand and a disclaimer on the other, they should be read consistently if possible. Article 2-316(1) provides that an express warranty and contract language seeming to disclaim it should be read consistently if possible, but the disclaimer must give way if such a reading is unreasonable.

Under the Vienna Convention, the parties' freedom of contract is given a wide support. Article 6 of the Convention states that the parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions. Article 35 provides that the implied obligations in paragraph (2) do not apply "where the parties have agreed otherwise."<sup>40</sup> If there is a clause in the contract which expressly excludes the implied conditions as to quality and fitness, is it valid? Does the Convention concern itself with the validity of such clauses?

There are two important things to note about the Convention. First, it has no application to sales of goods bought for personal, family and household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.<sup>41</sup> Therefore, there is no problem of having to deal with liability disclaimer clause in consumer sales because the Convention is only concerned with commercial sales. Second, the Convention is concerned with only the formation of the contract and the rights and obligations of the parties.<sup>42</sup> Back to the question of whether the Convention deals with the validity of disclaimer clause the answer is no. Article 4(a) says that the Convention is not concerned with the validity of the contract or of any of its provisions or of any usage.

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<sup>40</sup> Para (2) Article 35.

<sup>41</sup> Article 2(a).

<sup>42</sup> Article 4.

So, if there is such a clause in the contract, what should the unfortunate buyer do? Should the buyer should on the domestic law? He could do so since the Convention is silent on the question of validity. But Article 4 should not be read broadly as that would import domestic rules that would supersede the Convention.<sup>43</sup> What can be done is to refer to Article 8(2) of the Convention which says that the statements of a party (including contract terms he has drafted) "are to be interpreted according to the understanding that a reasonable person of the same kind as the other party (the buyer) would have had in the same circumstance". What this means is that a statement by the seller is to be interpreted according to the understanding of a reasonable person of the same kind as the buyer. This Article addresses the same issue as Article 2-316(3) of the Uniform Commercial Code which gives effect to a clause which in "common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." So, if the language is vague and ambiguous so that a reasonable buyer could not understand it to mean an exclusion of the implied warranty, the clause would be held to be ineffective. The underlying principle is, therefore, the reasonableness of an understanding of the disclaimer rather than reasonableness of the clause as under the English law.

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<sup>43</sup> Honnold, *Uniform Law for International Sales, Under the 1980 UN Convention*, p. 259.

#### **(IV) CONCLUSION**

From the above discussion on the issue of exemption clauses or disclaimer clauses, we can see that there are some differences in their treatment under English law, American law and under Convention. In the United Kingdom, the Unfair Contract Terms Act 1977 prohibits the exclusion of the implied terms under the Sale of Goods Act in relation to consumer sales. In America, in relation to consumer sales, there is the Magnuson-Moss Warranty Act 1975 which aimed at providing a minimum warranty protection for consumers. It applies to sales of consumer products that cost more than \$10 per item and that are made to a consumer. "Consumer product" is defined in section 101(1) as tangible personal property normally used for personal, family, or household purposes. A "consumer" is defined in section 101(3) as a buyer (other than for purpose of resale) of any consumer product. Where there is a sale of a consumer product to a consumer, the seller can either give a full or a limited written warranty. When he gives a written warranty, he may not disclaim or modify any implied warranty in respect of such consumer product.<sup>44</sup>

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<sup>44</sup> This is provided in section 103 of the Magnuson-Moss Warranty Act 1975. The implied warranty means implied warranty arising under the state law. These are the same as under the Uniform Commercial Code because the state law has adopted the Code.



In commercial sales, the laws in the United Kingdom and America are quite similar. In the United Kingdom, an exemption clause is effective only if it is fair or reasonable. In America, the validity of a liability disclaimer clause depends on the reasonableness of its understanding by the buyer. If the clause is not reasonably understood, then it may be held not to be effective. In commercial sales, the parties are usually of equal bargaining power, and the courts would be reluctant to interfere with their freedom to contract. Unless the clause is unreasonable or unconscionable, the court will declare the clause effective.

## **CHAPTER SEVEN**

### **IMPLIED WARRANTIES IN THE COMMON LAW WORLD**

#### **INTRODUCTION**

This chapter covers the treatment of contracts for the sale of goods under the Uniform Commercial Code in the United States of America and under the Australian and New Zealand legislation. Located in the 'Pacific rim' economies like Malaysia, it is relevant to consider the problems encountered by these systems in developing their law of sales and to see how they deal with these problems. Would they be a better example to follow rather than the English legislation?

#### **(I) THE UNIFORM COMMERCIAL CODE**

##### **(a) BACKGROUND OF THE CODE**

Prior to 1906, United States commercial law was basically governed by the common law derived from the English common law where the principles were derived from the cases decided by the courts. This system had injected some element of elasticity in the law. However, in so far as there existed elasticity, there was also an element of uncertainty and obscurity in the law. With fifty states in the United States of America, it is not difficult to imagine how diverse the laws might be on a particular issue, as

different states might deal differently with a similar matter. Because of this, it was felt that there was a need for a codification of the commercial law. Furthermore, the diversity in the law posed as an obstacle to inter-state trade that had increased tremendously due to improvements in communication and transport.

Secondly, a change in the law was felt necessary because, while the common law of sales was reasonably adequate for the period during which it developed, industrial and technological changes had rendered its framework out of date. Methods of production and distribution of goods had become increasingly complex, so much so that the common law rule of *caveat emptor* became inapplicable. Goods sold in sealed containers could not be readily inspected even where inspection before purchase was permitted.<sup>1</sup>

Finally, a code on commercial law was felt to be necessary as an easy reference tool on the subject, serving a function for economic and social enterprises. By having a uniform commercial code applicable throughout the states in America, it was hoped that the law could be harmonised and the existing common law replaced. So, in 1906, the Uniform Sales Act, drafted by Professor Samuel Williston, was passed.

The Uniform Sales Act was the first attempt at codifying the commercial law. However, it was not successful because fifteen years on, only twenty-three states had

adopted the Act.<sup>2</sup> The reason for such a failure was that the Act was based on the English Sale of Goods Act 1893, which was basically a restatement of the common law, reflecting the nineteenth-century English sales law where the typical transaction was the face-to-face sale. Therefore, the provisions of the Act did not cater for the reality of contemporary sales transactions. The Uniform Sales Act was once described as ‘codification’ in the traditional Anglo-American manner, a mere collection of the current concepts as gleaned from the latest expressions of judicial opinion, grouped and arranged with proper respect for tradition and history.”<sup>3</sup> The failure of more than half of the jurisdictions to adopt the Act was a signal that the Act was obsolete and there was still lack of uniformity.<sup>4</sup>

In 1940, the American Law Institute and the National Conference of Commissioners on Uniform State Law jointly undertook the considerable project of preparing a comprehensive Commercial Code that would take the place of the various acts already in the field and also cover some other matter that had not been codified.

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<sup>1</sup> Gilmore, “On the Difficulties of Codifying Commercial Law”, **Yale Law Journal**, vol. 57, 1948, p.1341.

<sup>2</sup> Morrow, “Warranty of Quality: A Comparative Survey I,” **Tulane Law Review**, vol. 14, 1940, p.327.

<sup>3</sup> *id.* p. 338.

<sup>4</sup> Wiseman, “The Limits of Vision: Karl Llewellyn and the Merchant Rules”, **Harvard Law Review**, vol.100, 1987, p.465.

The man who took the lead in engineering the project was Karl Llewellyn. Together with other judges and lawyers, he performed the monumental task of drafting the Uniform Commercial Code. Llewellyn was a realist legal thinker, who viewed law as a means to social ends, and he recognised the need to re-examine it constantly to ensure that it would fit the society it aimed to serve. His vision when drafting the Code was to propose a law that was more in line with merchant reality, reflecting the better standards, practices, understandings and needs of the merchants. He believed that the law should encourage better practices and control abuses of the market. He proposed different standards to be applicable to merchants and to individuals who lacked knowledge and expertise of these standards. He also proposed that there should be a manufacturer's warranty of freedom from dangerous product defects to both dealers and ultimate consumers.<sup>5</sup> Llewellyn took ten years to complete the first edition, working, that is, from 1942 to 1952. Two later editions followed in 1958 and 1962.<sup>6</sup> When the Code finally came into existence, Article 2 on Sales did not secure much of his realist vision and his conception of merchant rules had been imperfectly achieved. However, his ideas and approach dominated the final product.<sup>7</sup>

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<sup>5</sup> id. p. 492.

<sup>6</sup> **Understanding The Uniform Commercial Code**, David Lloyd, p.2

<sup>7</sup> **Commercial Law**, R.E.Speidel, et. al., p.423.

The Code is divided into nine substantive articles. The first is the general provision that provides for the application of the Code, subject matter and general definitions. Article 2 covers the sale of goods and lease of goods (Article 2A). Article 3 is on commercial paper or negotiable instruments, such as promissory notes and bank cheques. Article 4 deals with bank deposits and collections, which covers the relationship between bank cheques, deposits and credits between them. Article 4A is about fund transfers, including modern electronic fund transfers. Article 5 covers letters of credit issued by banks, usually used by business people to guarantee payment of obligation. Article 6 deals with bulk transfers and concerns bulk of all of a business inventory. Article 7 is about warehouse receipts, bills of lading and other documents of title. It covers these documents used in large wholesale transactions concerning the ownership and risk of loss of goods. Article 8 concerns investment securities, i.e. the regulations of investment securities. Finally in Article 9 it deals with secured transactions which covers security interest in all types of personal property, including account receivable, equipment and inventory.

The Uniform Commercial Code is a model that has now been adopted by all the states in the United States of America. However, it is not entirely uniform in all the states because they may have made revisions to the Code to satisfy the states' own commercial needs and circumstances. Furthermore, the courts in each state can reach at different result when interpreting the provisions in the Code. As a result, there cannot be a presumption that the law will be the same in each state. But nevertheless,



the Uniform Commercial Code has facilitated much greater uniformity of the commercial laws in the United States. It also allows commercial practices to develop through custom, usage and agreement of the parties.<sup>8</sup>

## **(b) SALE OF GOODS UNDER THE UNIFORM COMMERCIAL CODE**

### **(i) Nature and Characteristics of Article 2**

Article 2 is basically a codification of the existing common law and covers all aspects of the sale of goods that may have a legal consequence. It applies to transactions in goods. Transaction in goods covers a 'sale', where title passes from the seller to the buyer for a price and also a 'contract for sale', which includes both present and future sales. In a present sale, the making of the contract and the completion of the sale (passing of property) occur at the same time. In a future sale, the making of the contract and the completion of the sale occur at different times.<sup>9</sup>

In order to understand how the contract of sale of goods is dealt with under Article 2, it is necessary first to understand some basic concepts found in the provisions. First is the concept of good faith. Good faith is the significant or the main feature of

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<sup>8</sup> *ibid.*

<sup>9</sup> **Modern Business Law**, Thomas W.Dunfee, et. al., p. 358.

the Code. In Article 2 this requirement is made explicit in thirteen sections, and nineteen sections include comments which also use the phrase.<sup>10</sup> In Article 1-203 good faith is to be observed “in the performance and enforcement of every contract”. But sometimes it may be necessary and relevant at the formation stage, for example, when the parties agreed that the price is to be fixed by the seller or the buyer. This means the price is to be fixed in good faith.

The good faith obligation can be related to the “merchant rules” concept, whereby good faith in respect of merchants is much higher than for a private individual. There are fourteen provisions in which the term “merchant” appears. These provisions include the warranty of title, and the implied warranty of merchantability. The draftsman invented these “merchant rules” in order to make “commercial law and practice clear, sane and safe”.<sup>11</sup> He wanted simpler, clearer and better adjusted rules which would make sense and protect good faith. Merchants could expect more predictable and more satisfactory results both in and out of court.<sup>12</sup> These are functional rules that could guide businessmen in conducting their business affairs and to assist them in solving their problems and planning for the future.

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<sup>10</sup> **Commercial Law**, R.E.Speidel, et. al., p. 442.

<sup>11</sup> *Id.* p. 428.

<sup>12</sup> Hillinger, The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve The Good, The True, The Beautiful in Commercial Law, 73 **Geo.L.J.** 1141.

Another important concept found in Article 2 is the concept of the unconscionable contract. A contract can be declared unconscionable by the court if it contravenes public policy, the terms are unfair, good faith is not observed, it contains exculpatory clauses and for various other reasons. Article 2-302 of the Code provides that if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, it may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. Under subsection (2) the court can hear evidence in order to determine this issue. Factors relevant for consideration would be the relative bargaining power between the parties, whether one party is economically stronger than the other, whether the parties have options, and the reasonableness of the clause that is alleged to be unconscionable. The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.<sup>13</sup> If, looking at the circumstances of the case, they are unconscionable then the court can simply refuse to enforce it.

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<sup>13</sup> Thomas, W. Dunfree, *op. cit.* p. 261.

In the case of *Zapatha v Dairy Mart Inc.* (1980)<sup>14</sup> the issue of unconscionability was raised. The Zapathas entered into a franchise agreement with Dairy Mart Inc. under which there was a clause giving the latter the power to terminate the agreement without cause. When the agreement was terminated, the Zapathas brought an action against Dairy Mart Inc. claiming, among other things, that the termination clause was unconscionable. The judge held, in the first instance, that the clause was indeed unconscionable as it gave the right to terminate the agreement without cause and the termination was against good faith. The case went on appeal and the decision of the lower court was confirmed. It went on for further appeal to the Supreme Judicial Court of Massachusetts which held that, based on the facts of the case, the termination clause was not unconscionable. Mr. Zapatha was a graduate and had been employed by a company involved in business for more than ten years, so there could not be said to be an unfair surprise for him. Furthermore the clause was neither obscurely worded nor buried in the fine print of the contract. The term was straightforward and there had been no necessity to consult a lawyer. The Zapathas also had had ample time to consider the agreement. The court was also satisfied that Dairy Mart Inc. had acted in good faith in accordance with the reasonable commercial standards of fair dealing in terminating the agreement.

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<sup>14</sup> 381 Mass. 294 (1980)

Another concept found in Article 2 is the concept of agreement. Agreement as defined in the Code means the bargain of the parties in fact, as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. Article 2 is based on the concept of agreement rather than on the concept of promise because the scope of the obligations of the parties to the contract goes beyond promises. Firstly, when a seller affirms a certain fact, this becomes an express warranty, a form of an obligation rather than a mere promise. Secondly, many obligations in the law of sales are implied by virtue of tacit assumptions, customs, usage, course of dealings and course of performance. These are implied undertakings and not merely promises. Finally, even if the obligations are not expressed or implied, they may be imposed by reason of the doctrine of good faith and fair dealing.

Last but not least is the concept of title that has been modified under the Uniform Commercial Code. Under previous law, title had been used as a determining factor to the rights and liabilities of the parties, for example, allocation of risk of loss, rights against third parties and insurability. Before these rights can be determined, it must first be resolved who has the title to the goods. The law is no longer so under the Code as it has separate sections dealing with the rights and obligations of the parties which will apply irrespective of title except where there is a specific provision which refers to title. Generally, the parties are free to arrange by express agreement for the transfer of title in any manner and on any conditions.

Thus, from the above discussion, it can be seen that Article 2 is aimed at simplifying commercial matters by giving it a more practical and realistic approach. The parties are not strictly bound by the Code but are rather allowed to agree upon their own terms, with the law giving greater effect to their intention. By having flexible rules, the Code ensures that the agreement between the parties will not be frustrated for some technical reason. In short, the law of sale of goods under the Uniform Commercial Code is clear, simple, practical and flexible.

#### **(ii) Scope of Article 2**

Article 2, although it “applies to transactions in goods” (Article 2-102), is only concerned with sale of goods and “goods” is defined in Article 2-105 as all things which are movable at the time of identification for the contract for sale. Goods must therefore have these two characteristics: (1) they must be tangible or have physical existence and (2) they must be movable. Goods can also include things that are attached to the land but later to be severed or removed from the land, for example stone, sand, or timber as well as agricultural crops like corn, wheat etc. The Code does not apply to any transaction to buy or sell land or real estate. It also does not apply to any contract for service; for example an employment contract, where labour or service is a significant part of the contract. Sometimes contracts involve service or labour and goods. This is typical in most construction contracts, where it is hard to tell whether the Code is applicable or not. A contract for sale of timber is definitely a



contract for sale of goods. But a contract for carpentry labour only is definitely a service contract where the Code would not be applicable.

It is important to determine whether a contract is a contract for the sale of goods within the scope of Article 2 because, if does, then there is a relevant issue of warranty which needs to be considered. When the seller of goods makes a representation to the buyer as to the character, quality or title to the goods, as part of the contract of sale, that constitutes a warranty. A warranty can either be express or implied. Express warranty is made through words or action of the seller for example statement describing the goods is an express warranty. Implied warranty is one that arises by operation of law, for example, the implied warranties of merchantability and fitness for a particular purpose. The law of warranty is aimed at providing a certain amount of commercial reliability in business dealings and protecting the buyer's (merchant or non-merchant) expectations by imposing liability on the seller who is in breach of the express or implied undertaking.<sup>15</sup>

The law of warranty under the Uniform Commercial Code is in some respects different from the law of warranty under the Sale of Goods Act 1893. The most striking difference can be seen in respect of the warranty of description. Under the

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<sup>15</sup> Warranty under the UCC is dealt with in greater detail below in chapters 4, 5 and 6 where the contents of the Code will be found.

Code, Article 2-313 (b) provides that any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. Section 13 of the Sale of Goods Act 1893, on the other hand, implied this warranty into the contract of sale. It is quite obvious and logical that whatever is said about the goods which form the basis of the contract should be regarded as an express term rather than an implied term.

In the case of *Interco. Inc. v. Randustrial Corp* (1976)<sup>16</sup> the plaintiff brought an action against the defendant for breach of an express warranty of description under Article 2-313 of the Code. The plaintiff purchased from the defendant a product known as “Syclox” which was designed as a floor covering to smooth rough surfaces. The product was satisfactorily used the first time and more was purchased for use on other rough areas of the plaintiff’s building. But this time, instead of remedying the problem, it simply made it worse. The catalogue described the product as “a hard yet malleable material which bonds firm to wood floors for smooth and easy hand-trucking. Syclox will also absorb considerable flex without cracking and is not softened by spillage of oil, grease or solvents”.

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<sup>16</sup> 1976 533 S.W.2d 257.

The issues raised in this case were whether the catalogue amounted to an express warranty and whether there was a breach of that warranty by the defendant. As to the first issue, the court held that the catalogue or the advertisement might constitute an express warranty provided that it formed a basis of the bargain, and that it must be read by the plaintiff. As to the second issue, the court held that it was a question of fact whether or not there was a breach. In the circumstances of the case, the court was satisfied that there was no breach because the problem was more than considerable and more than what Syclox was designed to accommodate.

To qualify as an express warranty, there must be some form of reliance by the plaintiff on the advertisement or catalogue. This means that it must form the basis of the bargain between the parties for any warranties to arise based on whatever is found in the advertisement or catalogue. On this point, it is similar to the requirement under the Sale of Goods Act 1893. In the sale of future or unascertained goods, reliance would be easy to presume as the buyer had not seen the goods. However, in sale of specific goods which are present before the buyer, it would be quite a burden on the him to prove that he bought the goods because he relied on the advertisement rather than on his own judgment after seeing the goods.

The second distinction between the Uniform Commercial Code and the Sale of Goods Act 1893 pertains to the implied warranty of merchantable quality. Under the Code this warranty is not confined to sale by description only as in the 1893 Act. So,

its application is wider. But what is more important is that, in Article 2-314(2), the Code spells out the minimum standard of merchantability. Goods must be such as:-

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair and average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used, and
- (d) run, with the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged and labeled as the agreement may require; and
- (f) are conform to the promises or affirmations of fact made on the container or label if any.

The issue of merchantable quality was discussed in the case of *Delano Growers' Cooperative Winery v. Supreme Wine Co., Inc.* (1985).<sup>17</sup> The plaintiff filed a suit against the defendant seeking US\$25,823.25 for wine sold and delivered. In its defence, the defendant asserted that it did not owe the plaintiff as the wine was not merchantable. The defendant then counterclaimed for breach of contract alleging that the earlier shipment of wine, for which price had been paid, was spoiled due to the presence of *lactobacillus trichodes* (Fresno mold). The defendant operated a wine

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<sup>17</sup> (1985) 393 Mass. 666, 473 N.E.2d 1066.

bottling plant in Boston and it bought wine, ready for bottling, from the plaintiff in California. The wine was shipped in tank cars and was then pumped into storage tanks from which it was later filtered into bottles for delivery. After five years of business, the defendant began receiving returns of the wine from their customers. The wine was producing sediment, cloudy and contained hairy substance.

The issue before the court was whether the plaintiff was in breach of the implied term of merchantable quality. The plaintiff raised two arguments: (1) that when it delivered wine that appeared good and which could be bottled, its obligation was satisfied, and (2) all Californian sweet wine contained Fresno mold, therefore, the presence of such mold could not cause the wine to be unmerchantable. The court rejected the plaintiff's arguments and held that no other Californian wine had bacterial problem. There were evidence to show that mold was found in sample taken from the tank cars in which the plaintiff's wine was transported. The presence of the mold had caused the wine to be unfit for the ordinary purpose for which finished wine was used and therefore was not merchantable.

The minimum standard of merchantable quality is also applicable to used or second-hand goods, but of course less can be expected of it in quality than if the item is bought new. Whether the goods are significantly discounted may help in

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determining what standard of quality should apply to the transaction. This means that the element of price is relevant in determining quality. In *International Petroleum Services, Inc. v. S & N Well Service, Inc.* (1982),<sup>18</sup> two units of used oil well servicing equipment were sold to the defendant by the plaintiff. One of the units had problems with its diesel engine; its fourth gear kept slipping out, the air compressor was not connected properly and the motor threw a connecting rod. The unit was returned to the plaintiff and a new connecting rod was installed and the oil line was properly connected. No charges were made for these repairs. The unit then worked fine for ninety days at which time the engine began to misfire and it became overheated. Close examination revealed that a head gasket was blown, the engine head was cracked and the pistons were cupped out. In effect the engine was worn out and needed a complete rebuilt. Despite all these problems, the court held that, since there was no evidence as to the extent of the discount in the price of this used machinery, it was therefore difficult to decide what standards of quality should apply. Furthermore, the unit did operate satisfactorily for ninety days after the initial adjustments and repairs were made without charge. The court found that the machine was fit for the ordinary purposes for which such goods are generally used, and even after the diesel engine wore out, it still could be and was rebuilt and was then put back in service.

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<sup>18</sup> (1982) 230 Kan. 452, 639 P.2d 29.



Thirdly, the Uniform Commercial Code is distinct from the Sale of Goods Act 1893 in respect of the implied warranty of fitness for particular purpose. Under Article 2-315, where the seller has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment, there is an implied warranty of fitness for particular purpose. Under the 1893 Act the buyer had to satisfy the court that he had expressly or by implication made known to the seller the particular purpose for which the goods were required so as to show that he relied on the seller's skill or judgment. The courts however had held that, if the seller knew the purpose for which the buyer wanted the goods, the buyer would be taken to have relied on the seller's skill or judgment.<sup>19</sup> The difference between the two provisions lies in the fact that, under the Code, the seller "must have reason so know" the particular purpose the goods are required and thus there is no need to prove actual knowledge. Under the Act the buyer had to show that he had made known to the seller that the particular purpose for which the goods are required. Reliance will then be presumed.

In *Gates v. Abernathy* (1972)<sup>20</sup> the plaintiff went to the defendant's shop with the intention to buy some clothes for his wife who had frequently shopped there. The

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<sup>19</sup> *Ashington Piggeries Ltd. v. Christopher Hill Ltd.* [1972] AC 441.

<sup>20</sup> 1972 11 UCC 491.

plaintiff did not know the size his wife wore, but spoke to the store manager and explained his intention to her. She showed him some items of clothing and said that she was certain they would be proper for his wife. The plaintiff selected a few in the size recommended by the store manager. It was understood that they would be returnable if they did not fit. The clothes were found to be too big for his wife and since there was nothing in her size, she demanded a refund. The defendant refused. This action was brought for the return of the money paid on the basis that there was a breach of the implied warranty of fitness for a particular purpose. The court held that the defendant was liable because the plaintiff was relying on the judgment of the seller to furnish the kind of goods he wanted. Furthermore, there was no doubt that the seller was aware that the buyer was relying on her expertise.

This case can be compared with the English case of *Griffiths v. Peter Conway Ltd.* (1939)<sup>21</sup> where the plaintiff contracted dermatitis from a Harris tweed coat purchased from the defendant. The plaintiff was proven to have had an abnormally sensitive skin. She argued that her case came within the scope of the implied warranty as the coat was not fit for her particular purpose. The court rejected the plaintiff's argument because her special condition had not been disclosed to the defendant, as such the defendant could not be held responsible for her condition. Upon close analysis of this

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<sup>21</sup> [1939] 1 All ER 685.

case, it can be concluded that the requirements for the implied warranty of fitness for purpose under the Uniform Commercial Code and under the Sale of Goods Act 1893 are the same. If the plaintiff in *Griffiths* case had informed the defendant of her special condition, then the latter would be aware of this fact and the plaintiff could successfully argue that she had relied on the defendant's skill and judgment to supply goods suitable for her purpose. The result would then be the same as in the case of *Gates v. Abernathy*.

As regards the exclusion or the modification of warranties, the Code has made it difficult for the seller to exclude the warranties, especially the express warranty. Article 2-316(1) provides that words or conduct relevant to the creation of the express warranty and words or conduct tending to negate or limit the warranty shall be construed whenever reasonable as consistent with each other and the negation or limitation is inoperative to the extent that such construction is unreasonable. The implied warranties may be excluded but this must be done in a certain manner prescribed by the Code itself. For merchantable quality, the disclaimer must mention the word "merchantability" and for fitness for purpose, the exclusion must be in writing and conspicuous. Under the Sale of Goods Act 1893, by contrast, by virtue of section 55, implied terms and conditions could simply be negated or varied by express agreement, or by course of dealing between the parties or by usage. The law had placed so much weight on the freedom to contract without taking into consideration the bargaining powers of the parties.

Thus, it can be said that the reformulation of the Uniform Commercial Code had resolved some of the problems brought about by the Uniform Sales Act, which was which borrowed heavily from the Sale of Goods Act 1893.

## **(II) AUSTRALIAN AND NEW ZEALAND LEGISLATION ON SALE OF GOODS**

Due to the historical fact of colonial occupation by the English, the legacy of English law has been bequeathed to many countries, including Australia and New Zealand. In these countries the legislation on sale of goods is based on English law, in particular the Sale of Goods Act 1893. Australia is comprised of states and territories and each of them has its own sale of goods legislation, namely, the Sale of Goods Act 1954 (Australian Capital Territory), the Sale of Goods Act 1923 (New South Wales), the Sale of Goods Act 1972 (Northern Territory), the Sale of Goods Act 1896 (Queensland), the Sale of Goods Act 1895 (South Australia), the Sale of Goods Act 1896 (Tasmania), the Goods Act 1958 (Victoria) and the Sale of Goods Act 1895 (Western Australia). All these Acts have some degree of uniformity between them because they are all based on the same parent Act of 1893. However, some jurisdictions have amended or repealed some of the provisions in the parent Act. Furthermore, since the Sale of Goods Act is not a complete code, there are other

relevant statutes that have been passed by the states and territories and that can be referred to, especially when dealing with protection of consumers.

Since the above Acts are all based on the 1893 Act, the problems identified in the United Kingdom have also arisen in Australia. The gist of the problem lies in the concept of “merchantable quality”, which is out-dated and not defined in the Act. The definition of the term has been left to the courts and in the Australian case of *Grant v. Australian Knitting Mills Ltd.* (1933)<sup>22</sup> the court held that goods are merchantable if it “..... should be in such a state that a buyer, fully acquainted with the facts ..... would buy them without abatement of the price obtainable for such goods if in reasonably sound condition and without special terms.” Price is an important consideration in this definition. Goods cannot be said to be unmerchantable just because they cannot be sold at the contract price but only at a slightly lower price. Goods will be unmerchantable only if they are sold at a substantially low price. This can be seen in the case of *H. Beecham & Co. Pty Ltd. v. Francis Howard & Co. Pty. Ltd.* (1921)<sup>23</sup> where the buyer had bought spruce timber from the seller for purpose of making pianos, but later it was found to be affected by dry rot. The seller argued that the timber was merchantable because it was still saleable for making boxes. But the buyer had paid 80 shillings per hundred feet of timber while spruce timber for making

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<sup>22</sup> (1933) 50 CLR 387.

<sup>23</sup> [1921] VLR 428

boxes was worth only 30 shillings. The court held that because of the substantial difference between the price, the timber was not merchantable as “no business man, having a contract to buy spruce timber whether for resale or for purposes of manufacture, would think for a moment of accepting this timber, its condition being known, without a very large reduction upon current market prices.”

As for the implied warranty of fitness for purpose, some difficulty has arisen where the specified purpose for which the buyer wants the goods is made known to the seller but there is some peculiarity about the purpose of which the seller is not aware. Should the seller be liable if he supplied goods which are not fit for use because of such peculiarity? It was held that the requirement of fitness does not extend to protect a buyer who suffers from some abnormality, unless the seller is made aware of the special circumstances.<sup>24</sup>

The disclosure of the particular purpose would be evidence of reliance on the seller's skill and judgment and actual reliance is one of the elements to be proven by the buyer. In the case of *Ashford Shire Council v. Dependable Motors Pty. Ltd.* (1960)<sup>25</sup> the plaintiff brought an action against the defendant for breach of the implied term of fitness for a particular purpose. The council required a tractor for use in

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<sup>24</sup> *Levi v. Colgate-Palmolive Pty. Ltd.* (1941) 41 SR (NSW) 48.

<sup>25</sup> 1960 104 CLR 139.



roadworks. The defendant company had such a machine in their showroom. The council instructed its engineer to inspect the machine and see whether it was suitable for the proposed work. The engineer went to the company's showroom and informed the managing director that the machine was required for roadwork and asked whether it could perform such work which he described. Following the discussion, the engineer reported to the council that the machine seemed to have plenty of horsepower and was big enough to do the work. The machine was purchased, relying on the report. It was however not able to function. The court held in this case that the engineer having disclosed the proposed purpose for which the machine was required, had acted on the skill and judgment of the managing director of the company. And as his assurances had induced the engineer's report to the council which had in turn induced the purchase of the machine, the council had relied on the company's skill and judgment. Consequently, as the machine was unsuitable for roadwork, the council was entitled to damages.

If the buyer orders goods under their patent or other trade name so as to show that he is satisfied that they will answer his purpose and that he is not relying on the seller's skill and judgment, the condition is not applicable. But the mere fact that goods are described in the contract by such a name will not necessarily make the proviso applicable. In *Martin v. McNamara* (1951),<sup>26</sup> it was provided in a building

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<sup>26</sup> [1951] Qd SR 225.

contract that a certain class of roof should be used. However, the builder informed the owner that the tiles specified would not be available for a long time. The owner asked what would be the best to use and the builder suggested Cornish tiles. The owner informed the contractor that he would rely on the latter's skill and expertise and the contractor assured him that Cornish tiles were "quite all right". The owner then instructed him "to go ahead with Cornish tiles". They were used but proved not fit for purpose. It was held that the fact that the owner asked for the Cornish tiles did not exclude the implied condition as to fitness as he had indicated that he was relying on the skill and judgment of the contractor.

In the foregoing case, the fact of reliance prevailed over the mere circumstance that a trade name was used. Since reliance is the key element in the application of this implied warranty, it will cease to apply if the buyer buys the goods relying on its trade or patent name. This is an indication that he is not relying on the seller's skill and judgment.<sup>27</sup> This proviso in the section is actually redundant because the criterion for the operation of the section is whether there is reliance on the part of the buyer, there

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<sup>27</sup> Sale of Goods Act 1954 (ACT), s.19(2); Sale of Goods Act 1923 (NSW), s. 19(1); Sale of Goods Act 1972 (NT), s. 19(a); Sale of Goods Act (Qld.), s. 17(1); Sale of Goods Act 1895 (SA), s.14(I); Sale of Goods Act 1896 (tas), s.19(a); Sale of Goods Act 1958 (Vic.), s. 19(a); Sale of Goods Act 1895 (WA), s. 14(I).

is no need for the proviso. The trade name should only be a factor to be taken into account in deciding whether or not there has been actual reliance.<sup>28</sup>

Besides the above mentioned problems, the Australian Sale of Goods Acts preserve the distinction between “conditions” and “warranties” and this distinction determines the kind of remedies available to the innocent party. Sometimes, even though the breach may not be serious, if the term breached is a “condition”, the remedy is repudiation. As such, in New South Wales, section 4(5) has introduced the concept of “intermediate stipulation”. The section provides that nothing in the Act is to be construed “as excluding a right to treat a contract of sale as repudiated for a sufficiently serious breach of a stipulation that is neither a condition nor a warranty but is an intermediate stipulation”. This means that the classification of the terms into “conditions” and “warranties” is not exhaustive. The remedy available is dependent upon the seriousness of the breach.

It is provided by the Australian Sale of Goods Acts, following the original 1893 Act, that the implied terms may be negated, excluded or varied by express

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<sup>28</sup> This proviso has been deleted from the corresponding subsection in the Commonwealth Trade Practices Act 1974.

agreement or by the course of dealing between the parties or by usage.<sup>29</sup> Such exclusion clauses in standard form contracts between parties of equal bargaining power would give rise to no problem. But if the parties were suppliers on the one hand, and consumers on the other, such clauses would provide no protection to the consumer buyers. This has resulted in many states and territories in Australia enacting statutes designed to protect consumers. In New South Wales the Sale of Goods Act 1923 now provides that the implied conditions as to correspondence with description, merchantable quality, fitness for purpose, and the conditions implied in a contract for sale by sample, cannot be excluded or modified in the case of a “consumer sale”.<sup>30</sup> A “consumer sale” means a sale of goods (other than a sale by auction) by a seller in the course of a business where the goods:

- (1) are of a kind commonly bought for private use or consumption; and
- (2) are sold to a person who does not buy or hold himself or herself out as buying them in the course of a business.

In Victoria, the Goods (Sales and Leases) Act 1981 inserted into the Goods Act 1958 a new Part IV entitled “Implied Conditions and Warranties in Certain Sales and Leases”, ranging from sections 84 – 119, which essentially applies to consumer

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<sup>29</sup> N.S.W, Sale of Goods Act, s.57; Vic., s.61; Qld., s.56; S.A., s.54; W.A., s.54; Tas., s.59; A.C.T., s.58; N.T., s.57.

<sup>30</sup> This provision is included in the Sale of Goods Act 1923 by virtue of an amendment made by the Commercial Transaction (Miscellaneous Provisions) Act 1974, s.7.

transactions. Where a contract falls within the scope of Part IV, the implied terms in the Goods Act are no longer applicable but are replaced with analogous non-excludable implied terms. In South Australia, section 8 of the Consumer Transactions Act 1972 implies in every “consumer contract” for the sale or supply of goods, conditions as to correspondence with description, merchantable quality and fitness for purpose analogous to those implied in contracts of sale by the Sale of Goods Act 1895. But this Act does not make it a requirement for the condition of merchantability to be applicable in cases of sale by description and it is also not applicable to latent defects. Section 8(5) provides that goods are of merchantable quality if they are as fit for the purpose for which goods of that description are ordinarily used as is reasonable to expect having regard to the price and the terms and conditions of the relevant consumer contract and the circumstances surrounding the formation of the contract and the apparent condition of the goods.

Besides the states’ legislation, there is also Commonwealth legislation, the Trade Practices Act 1974, which is aimed at protecting consumers. Sections 69 – 72 imply in contracts for the supply of goods by a corporation to a consumer the same conditions corresponding to those found in contracts of sale under the various states’ Sale of Goods legislation. These conditions cannot be excluded or restricted by the parties, at least where the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption.

In New Zealand, the law of sale is found in the Sale of Goods Act 1908, also based on the Sale of Goods Act 1893. Therefore, similar problems arise in this country. However, some of the issues are resolved differently by the New Zealand courts from the English courts. For example, in the case of *Taylor v. Combined Buyers Ltd.* (1924)<sup>31</sup> Salmond J took a wide view of what constitutes description in the case of unascertained goods, based on the fact that in such case the description is not a statement but a promise. According to him, every description and every part of the description is material, whether it relates to kind or quality, or to essential or unessential attributes. On the other hand, in the case of specific goods, he thought that the description meant a statement of the kind, class or species to which the article belongs. This contrasts with the view of the House of Lords in the case of *Ashington Piggeries Ltd. v. Christopher Hill Ltd.* (1972)<sup>32</sup> the distinction lies between identity and quality and not between specific or unascertained goods. Only a statement about the identity of the goods would constitute description, and nothing else.

Besides the Sale of Goods Act, there are other relevant statutes that deal with consumer protection, namely the Fair Trading Act 1986 and Consumer Guarantees Act 1993. As in Australia, the state of the law is far from being satisfactory. The provision as to contracting out in section 56 of the Sale of Goods Act 1908 has not

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<sup>31</sup> [1924] NZLR 627.

<sup>32</sup> [1972] AC 441.



been amended, thus giving the parties the freedom to contract out of the right, duty or liability implied under the contract of sale. However, there is a provision in the Contractual Remedies Act 1979 (section 4) which allows the court to interfere with any provision in the contract which tends to exclude the implied terms. This section provides that

“if a statement as to quality or fitness is made by the seller during negotiations for a contract, any provision in the contract purporting to exclude a Court from determining the question (a) whether the statement was made or given, (b) whether if it was made or given, it constituted a representation or term of the contract or (c) whether, if it was a representation, it was relied on, does not preclude the Court from determining any such question unless the Court considers it fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances.”

The issue of contracting out is also dealt with under the Consumer Guarantees Act 1993, which came into force on 1<sup>st</sup> April 1994. This Act covers, amongst other things, implied guarantees for goods and services, compensation for consumers and contracting out. By virtue of this Act, the use of exclusion clauses in contracts for the supply of goods and services could be an expensive exercise. This is because a supplier or a manufacturer who excludes or attempts to contract out of the Act can be liable for a fine of up to NZ\$30,000 if an individual, and NZ\$100,000 in case of a corporation. This Act is applicable to any contract for the supply of goods and

services to a consumer. As such, the Act covers goods that people generally buy for personal, domestic or household use, such as washing machines, cars etc.; and services would include those generally done for personal, domestic or household use, such as car repairs, dry cleaning, hair cuts and the like. For these transactions the Act imposes a wide range of obligations on the suppliers and manufacturers of the goods and services.

In the contract for the supply of goods, the Act implies these guarantees, which may be invoked against suppliers of goods:-

- (i) guarantee as to title
- (ii) guarantee as to acceptable quality
- (iii) guarantee as to fitness for particular purpose
- (iv) guarantee that goods supplied by description correspond with that description
- (v) guarantee that goods supplied by sample correspond with that sample
- (vi) guarantee, where the price is not set by contract, that the consumer will not be liable to pay more than a reasonable price for the goods.

“Acceptable quality” is a new concept which is to be distinguished from the concept of “merchantable quality” in the Sale of Goods Act. Since it was thought that “merchantable quality” was inappropriate in the consumer context, a new term was coined following the 1987 Report of the United Kingdom Law Commissions. Goods

would be of “acceptable quality” if, having regard to all relevant circumstances of the supply (including the nature of goods, their price and any statements made), a reasonable and informed consumer would regard the goods as acceptable in relation to their:-

- fitness for the purpose for which these goods are commonly supplied
- acceptability in appearance and finish
- freedom from minor defects
- safety and
- durability.

This Act also implies guarantees that may be invoked against manufacturers of the goods. These are:-

- a guarantee as to acceptable quality
- a guarantee that goods supplied by description correspond with that description
- a guarantee that repair facilities and spare parts are reasonably available for a reasonable period after supply.

The Consumer Guarantees Act 1993 is an attempt to reform the law of sale in New Zealand but there are still many loopholes in it. Firstly, the Act is drafted using the broadest possible statutory provisions with few or no de minimis provisions. For example, the Act is said to apply to the supply of goods and services “of a kind

ordinarily acquired for personal, domestic or household use or consumption". The problem is, how to determine whether or not the goods or the service fall within this classification? For example, a television set would come within the Act, but would the supply of 100 television sets be covered by the Act because 100 television sets would never be purchased for personal, household or domestic consumption? It could be argued that the Act applies because, irrespective of the number of the items purchased, the product remains one that is ordinarily acquired for personal, household or domestic use. An equivalent Australian statute<sup>33</sup> generally applies to goods or services priced at A\$40,000 or less, and to goods or services priced at more than A\$40,000 which are "of a kind ordinarily acquired for personal, domestic or household use or consumption". For this reason, it can be said that there is a guideline for consideration in deciding whether the goods or service comes within the category for personal, domestic or household use or consumption. In New Zealand it would be extremely difficult to decide whether or not the goods or services fall within this classification.

Secondly, the Act creates no independent body to enforce the statutory guarantees on behalf of the consumers. It is basically self-help legislation based on the belief that the setting out of the guarantees and remedies in the Act will assist suppliers and consumers to resolve their own disputes. If there is any dispute that arises, the

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<sup>33</sup> Trade Practices Act 1974.

consumer can bring his case to the Disputes Tribunal or proceed through the courts. But in many cases it will not be worthwhile for him to take such action as the value of the goods or services will not be that high.<sup>34</sup>

Thirdly, by virtue of section 43 of the Act, the guarantees may be excluded if the agreement is in writing between a supplier and a consumer who acquires (or holds himself out as acquiring) goods or services for the purposes of a business. This provision specifically allows a supplier, who is a person directly involved in supplying goods to the consumer, to contract out of the Act. The manufacturer however, has no such right. The problem arises because a consumer has rights both against the supplier and the manufacturer. As such, the manufacturer could be exposed to considerable liability, since he is unfortunately constrained in his ability to contract out of the Act. Accordingly, what the manufacturer could do is to have an undertaking from the supplier to contract out of the Act whenever supplying to a business consumer. Also the manufacturer could seek indemnity from the supplier in case of breach of any guarantee.

Finally, this Act is not a code. The rights and remedies provided therein are in addition to any other rights or remedies that a consumer may have. The provisions in

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<sup>34</sup>Dean, M and Jew, B., "Consumer Guarantees Act: More Than Just Liability for Defective Products",

the Sale of Goods Act 1908 will continue to apply to the sale of goods which do not fall under the ambit of the Consumer Guarantees Act 1993. The problem thus arises as to making sure which of the two Acts would be applicable in a particular situation.

Because of the shared heritage between the United Kingdom, Australia and New Zealand, changes in the law in the United Kingdom, i.e. the passing of the Sale and Supply of Goods Act 1994, would be of interest to these countries. Having the Sale of Goods Act of 1893 as the parent Act, Australia and New Zealand are facing the same problems once faced by the United Kingdom and was discussed in chapter two above. The question that has been persistently asked is; how to reform their law of sale?

It has been suggested that the reform to the Sale of Goods legislation in the United Kingdom is merely superficial rather than revolutionary. Changes were made only where necessary, and that is in respect of the implied term of quality. This kind of reform solves one problem by creating another. There are more general problems with the underlying concepts and structure of the Act itself.<sup>35</sup> Three possible approaches were proposed in revising the present state of law.<sup>36</sup> First, retain the essential structure

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<sup>35</sup> Lambiris, M., "Reform of the Law of Sale in Australia", vol. 20, **Melbourne University Law Review**, 1996, p.690.

<sup>36</sup> *id.* p. 699. Proposal is based on the Ontario Law Reform Commission report on the Sale of Goods.



and framework of the existing legislation, amending it where necessary. Second, adopt Article 2 of the Uniform Commercial Code in its current form without change. Third, to draft an entirely new Act, but borrow heavily from Article 2 in doing so. The first approach is less likely to work because, even though there has been an ongoing process of amending the law where it appears necessary, without radically altering the foundations of the original codification the whole process becomes worthless. Take for example, section 14 (1) of the English Sale of Goods Act which provides that,

“Except as provided by this section and by section 15 below, and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale.”

From the reading of this section, one can understand that the English law continues to reflect the old common law maxim of *caveat emptor*. However, this general rule has been eaten up by the exception because in almost every case the seller has an implied obligation to furnish goods that are of merchantable quality and fit for their purpose. The second approach is also not favourable because to import Article 2 without changes would be to adopt something which may be inappropriate, obsolete,

rigid or unsuitable to local circumstances. As such, the third alternative would seem to be the best option.

### **(III) CONCLUSION**

From the above discussion of the law of sale of goods in United States of America, Australia and New Zealand, the following conclusions can be reached:-

(i) The Sale of Goods Act 1893 was the model for the sale of goods legislation in many countries. This Act, which was basically the restatement of the common law position on the subject matter, reflected nineteenth-century concepts that are no longer suitable to present commercial situations.

(ii) Because of the inadequacy, complexity and rigidity of the common law of sale, there was a revolutionary change in the law of the United States of America as embodied in Article 2 of the Uniform Commercial Code. To a certain extent this provision maintains the key concepts of the Sale of Goods legislation regarding the implied warranties of merchantable quality and fitness for purpose. However, the meaning of the term “merchantable quality” under the Code is different from that in the English Act.

(iii) Australia and New Zealand are at a crossroads as to which approach to adopt in trying to reform their Sale of Goods legislation. There has been much support given

to codifying the law along the same line as the United States of America while modifying it to suit the local circumstances.

## **CHAPTER EIGHT**

### **SALE OF GOODS IN MALAYSIA**

#### **INTRODUCTION**

Currently in Malaysia there are two sets of laws governing sales, one for Peninsular Malaysia and the other for Sabah and Sarawak. In the Peninsula the applicable law is the Sale of Goods Act 1957 (Revised 1989). This Act is a revision of the former Sale of Goods (Malay States) Ordinance 1957 which was based on the Indian Sale of Goods Act 1930, which in turn was based on the English Sale of Goods Act 1893. As such, in the Peninsula, India and England, to the extent that the provisions in the 1893 Act had not been changed, the provisions are in pari materia.

The former Sale of Goods (Malay States) Ordinance 1957, as the name suggests, was only applicable to the "Malay States" and these were defined to include the states of Kelantan, Terengganu, Pahang, Johore, Negri Sembilan, Selangor, Kedah and Perlis. Penang, Malacca, Sabah and Sarawak were not included in this definition. By the Sale of Goods (Amendment and Extension) Act 1990, the 1957 Act was extended to Penang and Malacca. Thus, all states in the Peninsula are governed by the same Act. But Sabah and Sarawak are still not included. What is applicable in these two states is

the "English law administered in England in the like case at the corresponding period."<sup>1</sup> Why the Malaysian Sale of Goods Act 1957 was not made applicable to Sabah and Sarawak is not known.

Having two laws of sale governing the Peninsula and Sabah and Sarawak has caused some problems. Firstly, there is a lack of uniformity in the area of commercial law, and this retards the growth of nationhood and uniformity between the Peninsula and Sabah and Sarawak.<sup>2</sup> Secondly, the discrepancy between the two regions in the law relating to the sale of goods may give rise to a potential conflict of laws within the country. Parties to trade between the two regions may have to decide on the jurisdiction and the choice of law to govern their transactions.<sup>3</sup> But if we were to look at England and Scotland before 1856, in actual fact no practical difficulties seem to have been encountered by businessmen as a result of the differences in the laws of the two countries,<sup>4</sup> nor since, given that there have been and continue to be differences between the two laws up to the present day. Maybe it would be the same in Malaysia. But if there is such a problem, it would not be a major one, because not many cases have come before the courts and when they do, our courts tend to follow the English

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<sup>1</sup> Section 5(2) Civil Law Act 1956. What is meant by this phrase will be dealt with below.

<sup>2</sup> Wu Min Aun, **Legal Aspects of Sale of Goods**, p. 2 - 3.

<sup>3</sup> *ibid.*

<sup>4</sup> Rodger, "The Codification of Commercial Law in Victorian Britain", **Law Quarterly Review**, 1992, p. 570, at p. 575.

judicial authorities. There is no guarantee, however, that the problem will not arise. And when it does arise there will be unnecessary legal problems for businesses between the two regions.

## **(I) BRIEF HISTORY OF MALAYSIA**

### **(a) THE STRAITS SETTLEMENTS**

Malaya, as it was known before the Independence of 1957, has a history which dates back to the seventh century when the archipelago was "Indianized" via trade. Indian ideas flourished throughout the Peninsula for centuries but began to decline during the fourteenth century when Islam penetrated into South East Asia. Around the fifteenth century, a Malay prince by the name of Parameswara escaped from Tumasek (now Singapore) and took refuge in Malacca, where he set up a Sultanate. The establishment of Malacca facilitated the growth of trade and Islam. From the date of its founding till 1511, when it was occupied by the Portugese, Malacca was transformed from a small fishing village into an important port, well known internationally.

The first Europeans to appear in the Malayan scene were the Portugese. They were attracted by the wealth of Malacca and came as friends, but later they turned hostile. In 1511 Alfonso d'Albuquerque captured Malacca. The Portugese ruled until



1641 whereupon Malacca was taken over by the Dutch. The Dutch, (unlike the Portugese who were more interested in crushing the religion of Islam and faced enmity from the people), were more concerned with trade than anything else. The Dutch occupied Malacca until 1795, when the British briefly occupied it. But it was restored to the Dutch in 1801.

The British in the meantime were concentrating on trade in India and for this purpose they set up the East India Company. In the course of trade, British ships sailed from India to China. They would stop at the British port of call in Bencoolen (Sumatra), but it was situated in a bad location. The British needed a port upon their trade route, and this meant that a port along the Straits of Malacca. Since Malacca was already occupied by the Dutch, the British were offered the island of Penang. The offer was made by the Sultan of Kedah in return for British protection against the Siamese. In the year 1786, Captain Francis Light, on behalf of the East India Company, obtained cession of the island, and the British flag was hoisted on the island of Penang which was renamed Prince of Wales' Island. In 1807 a Charter of Justice was granted to Penang, and this is believed to have introduced the law of England into the colony.<sup>5</sup> It also established the Court of Judicature of Prince of Wales' Island with "...jurisdiction and authority as our Court of King's Bench, and our justices thereof,

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<sup>5</sup> Ahmad Ibrahim, *Malaysian Legal History*, University of Malaya Mimeograph, p. 22.

and also as our High Court of Chancery and our Courts of Common Pleas and Exchequer respectively, and the several justices, judges and barons thereof respectively have and may lawfully exercise within that part of our United Kingdom called England, in all civil and criminal actions and suits, and matters concerning the revenue, and in the control of all inferior courts and jurisdictions, as far as circumstances will admit."

The British invasion and interest in the region did not end there, for they were now eyeing the island of Singapore. By a political manouvre, Stamford Raffles managed to possess Singapore, much to the annoyance of the Dutch, who claimed that Singapore was a part of Johore of which they were an ally. The hostility between the Dutch and the British was settled by the Treaty of Holland in 1824, whereby the British gave up their rights in Sumatra to the Dutch and in return the Dutch released Malacca and Singapore to the British. The British now occupied and controlled three strategic ports, i.e. Penang, Malacca and Singapore, along the Straits of Malacca. These three settlements were incorporated into what is called the Straits Settlements in the year 1826 with Penang as its capital.

Upon the establishment of the Straits Settlements, a new charter was granted in 1826 which extended the jurisdiction of the Court of Judicature of Prince of Wales' Island to Singapore and Malacca. In 1855 a third charter was granted to re-organise the existing courts in the region. The Straits Settlements were administered as a Presidency, but it was too expensive and so it was downgraded to a Residency in 1830

and came under the administrative control of the Governor of Bengal. In the meantime, Singapore was developing fast as a trading port, and its growth was far beyond what was expected. In 1851 the jurisdiction over the Straits Settlements was removed from the Governor of Bengal to the Governor-General of India. Even this change did not solve the administrative problems, and it was felt that the Straits Settlements would be better administered direct from the Colonial Office in London. Eventually, after a lot of lobbying, in 1867 the Straits Settlements were separated from India and were administered direct from the Colonial Office in London.

#### **(b) THE MALAY STATES**

By the late nineteenth century British intervention in Malaya, direct or indirect, was greatly felt. Direct intervention took place in the states of Perak, Selangor, Pahang and Negri Sembilan whereby in 1895 they loosely formed themselves into a federation called the Federated Malay States. By virtue of a series of treaties each state accepted a British Resident who acted as an Advisor on matters affecting administration of the state and revenue, leaving only matters of religion and customs to the Sultan.<sup>6</sup> The running of the state was therefore in the hands of the British. Fearing total British control, the other five Malay states did not join the federation and they formed the

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<sup>6</sup>Clause 4 of the Treaty of Federation 1895 contained this clause:-

"They [the Rulers] undertake to provide him [British officer] with suitable accommodation, with such salary as is determined by HM's Government, and to follow his advice in all matters other than those touching the Mohammadan religion". Quoted from Maxwell and Gibson, *Treaties and Engagement affecting Malay States and Borneo*, Jas Truscott & Son Ltd. (1924) p. 71.

Unfederated Malay States. These states were Johore, Kelantan, Terengganu, Kedah and Perlis. Even though they did not accept a British Resident, they nevertheless accepted British protection.

The British began to control all the states in Malaya when they managed to persuade all the nine Sultans to surrender their legal sovereignty to the British Crown. In 1946, by virtue of the Malayan Union Order in Council, the federation of Malaya was extended to constitute the nine states plus the colonies of Malacca and Penang.<sup>7</sup> The move to establish a Malayan Union under full British control met with vehement protests from the Malays. The establishment was dismantled and displaced by the Federation of Malaya in 1948.<sup>8</sup> The federation became independent on 31<sup>st</sup> August 1957 after 171 years under the British control. In 1963 the federation was further extended when Sabah, Sarawak and Singapore joined and it was renamed Malaysia. Two years later, in 1965, Singapore left to become an independent republic.

### **(c) SABAH AND SARAWAK**

Sabah (formerly known as North Borneo) and Sarawak have their own history, and they were formerly the territories of Borneo. In the nineteenth century Sabah and Sarawak were claimed by the Sultan of Brunei, but in 1839 there was a revolt in

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<sup>7</sup>M.U. Gazette G.N. 2/1946. Quoted in Sufian, *Introduction to the Legal System of Malaysia*, p. 5.

<sup>8</sup>G.N. 6/1948.

Sarawak against the ruler. This event paved the way for the intervention by James Brooke who established three generations of "White Rajahs" in Sarawak. In the course of his travels, James Brooke arrived in Sarawak just at the right time to offer his assistance in return for a Governorship.

Upon his appointment as Governor, Brooke made many changes which were to restore law and order and to provide for a better administration of Sarawak. He was also eager to suppress piracy in the region. His effort was much appreciated by the British because suppressing piracy in the region created a safe passage for British ships which were carrying on trade with China. In 1847 there was an armed conflict with the Sultan of Brunei and the British stepped in to aid James Brooke by making the Sultan sign a Treaty of Friendship and Commerce. James Brooke was made the British Consul-General for Brunei and Borneo. By 1888 Britain had established a Protectorate over North Borneo, Sarawak and Brunei, which lasted until the Japanese Occupation in 1942. But these territories were freed from Japanese hands by the British after three years.

#### **(d) RECEPTION OF ENGLISH LAW INTO MALAYSIA**

From this history, there can be little doubt that English law was introduced into Malaysia by virtue of the royal Charters granted in 1807 and 1826. The first Charter in 1807 was to establish the Court of Judicature of Prince of Wales' Island which was to be made up of the Governor, three Councillors and one other Judge, to be called the

Recorder.<sup>9</sup> The Court had the jurisdiction and powers of the Superior Courts in England, but this jurisdiction was limited in that it had no power to try any suit against any person who had never been resident in the Settlement, nor against any person then resident in Great Britain or Ireland.<sup>10</sup>

The effect of the first Charter was to introduce English law into Penang. The second Charter of 1826 extended the first Charter to Malacca and Singapore and introduced uniformity in the law to the colony. In the case of *Rodyk v. Williamson* (1834)<sup>11</sup> it was held by Sir Benjamin Malkin, R. that he was:-

"Bound by the uniform course of authority to hold that the introduction of the King's Charter into these Settlements had introduced the existing law of England also, except in some cases where it was modified by express provision, and had abrogated any law previously existing."

In 1878 the Civil Law Ordinance was passed, bringing further into operation in the Colony a considerable body of English law. This Ordinance has since been repealed and replaced by what is now the Civil Law Act 1956. By means of sections 3 and 5 of the Act the courts are allowed to apply English law in certain circumstances. As far as

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<sup>9</sup>Braddell, *Law of the Straits Settlements*, 1982, p. 12.

<sup>10</sup>*ibid.*

<sup>11</sup>[1834] 2 Ky. Ec. p. 9.



commercial law is concerned, the appropriate section is section 5 whereby it is provided that:-

- (1) In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.
- (2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in the subsection (1), the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

Until 1932 there was no local legislation on the subject of sale of goods. It was in that year that the first legislation was enacted and it was initially for the Federated Malay States of Perak, Selangor, Pahang and Negri Sembilan. This was copied by two other states of Johore and Trengganu. In the states of Kedah, Perlis and Kelantan, there was no legislation until the passing of the Sale of Goods (Malay States) Ordinance 1957. The Attorney-General told the Federal Council during the second reading of the Bill:-

"It may be said that if it is desirable that the law should be uniform, why should this Bill be confined only to the Malay States? The reason to that is that in the Straits Settlements as is provided in the Civil Law Ordinance we passed last year, the commercial law is based upon the law prevailing in the United Kingdom, and the Sale of Goods is, of course, a branch of commercial law. It is not therefore necessary to legislate in regard to the Settlements. But the law, as far as I know, is exactly the same in the Settlements as it is here for the reason that the law as embodied in this Bill is the same as the law in the United Kingdom."<sup>12</sup>

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<sup>12</sup> Proceedings of the Federal Council 1957, p. 2528. Quoted in P. Balan, "The Warranty of Quiet Possession in Sale of Goods", *Journal of Malaysian Comparative Law*, 1976, p. 49.

It was said that the words of the Attorney-General had to be taken with a pinch of salt as there were significant differences between the law embodied in the Bill and the law applicable in the United Kingdom in 1957.<sup>13</sup>

The Sale of Goods (Malay States) Ordinance 1957 was applicable to all states in the Peninsula except Penang and Malacca. In these two states and in Sabah and Sarawak the English Sale of Goods Act was applicable. But the question is whether it is the English Sale of Goods Act of 1979 or the 1893 Act that is applicable by virtue of section 5(2) of the Civil Law Act 1956? In the case of *Tan Chong Motors v. Alan McKnight* (1983)<sup>14</sup> the court had the opportunity to decide this matter but it was not utilised. The case involved a member of the personnel of the Royal Australian Air Force, who was based in Penang and bought a car there to take back to his own country. He was entitled to purchase a car duty free in Malaysia and take it back to Australia. But the car had to conform to the Australian Design Regulation. The appellant's salesman made a representation that the car conformed to the ADR, when in actual fact it did not and as a result the respondent suffered a loss. He claimed damages for breach of a warranty. It was held that the appellant was liable in damages to the respondent. On the issue of whether the 1893 or the 1979 Sale of Goods Act was applicable in Penang the Judge held that the 1979 Act had completely replaced the

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<sup>13</sup> Sections 2, 4, 11 (b), 21 (2), 22, 24, 26, 49 (3), 50 (2), 50 (3), 53 (2), 53 (3), 53 (5), 57, 58, 59, 61 (1) of the 1893 Act were omitted. And there were some sections which were not present in that Act but were included in the Bill.

<sup>14</sup>[1983] 1 MLJ 220.

1893 one and that the provision in section 14(3) is not new, it being a re-enactment of section 14(1) though not in precisely identical terms. Thus, according to him, whatever Act it is, the buyer is entitled to rely on the implied condition. But he went further, to say that since in this case it was agreed that there was an express warranty given by the salesman, therefore there was no need to rely on the implied condition provision of the Act.

In a more recent case from Sarawak, *Teck Ngee Co. Sdn. Bhd. v. Tan Tian Lai Sago Mill* (1990),<sup>15</sup> the High Court of Borneo also refused to be decisive about the issue. The plaintiff, who was a judgment creditor, seized a motor vessel belonging to the defendant. The vessel was about to be put up for sale by public auction when there was an intervention by Tokyo Trading Co., who obtained a stay of the auction. The intervener contended that they had title to the engine that was fixed to the motor vessel. The claim was based on an agreement for sale of the said engine between the intervener and the defendant. Among the clauses of the agreement, it was agreed that property in the said engine should not pass to the defendant until the final payment had been made. The defendant had defaulted in the payment of instalments and therefore the property remained with the intervener. The judge referred to the provisions of both the 1893 and 1979 Acts relating to the passing of property, and held in agreement with

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<sup>15</sup>[1990] 2 CLJ 302.

the intervener. The judge did not however say which Act is the law applicable in Sarawak.

In the case of *Heng Leong Motor Trading Co. v. Osman bin Abdullah* (1994),<sup>16</sup> which will be looked at again later, it was held per curiam that by virtue of section 5 (2) of the Civil Law Act 1956, the law applicable in Sarawak for the purpose of this case was the United Kingdom Sale of Goods Act 1979 and not section 12 of the 1893 Act or section 14 of the Sale of Goods Act 1957. The court took this view because the transaction took place in 1983 therefore, the law applicable was the United Kingdom Sale of Goods Act 1979.

In yet another case, *Low Hock Jee v. Mayban Finance Bhd.* (1996)<sup>17</sup>, the High Court of Sabah and Sarawak held that by reason of section 5(2) of the Civil Law Act 1956, the law applicable in Sabah and Sarawak is not the Malaysian Sale of Goods Act 1957 but the English Sale of Goods Act 1979. In this case, the plaintiff bought a car from the defendant which was later seized by the Customs and Excise Department under section 128 of the Customs Act 1967, apparently for an offence under section 135(1)(d) of the same Act. The plaintiff in his action alleged that, in the circumstances, consideration for the car had failed and so he claimed for the refund of

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<sup>16</sup> [1994] 2 MLJ 456.

<sup>17</sup> [1996] 2 CLJ 479.

the price money. He argued that the defendant had breached the implied condition that he (the seller) had the right to sell the car and also that he should have a quiet possession of the car. The preliminary issue for the court to consider was what was the law applicable in the case. The judge, Suleiman Hashim J., held that by virtue of section 5(2) of the Civil Law Act 1957, the law applicable is the English Sale of Goods Act 1979 and not the Malaysian Sale of Goods Act 1957.

From the above cases it is clear that the phrase “..... in the like case at the corresponding period .....” in section 5(2) of the Civil Law Act 1956 refer to the law applicable in England at the time of the dispute. According to Bartholomew, under section 5(2), English law may be received at any time up to the corresponding period, and this constitutes the principal difference between the commercial law of the Malay states (West Malaysia) and Sabah and Sarawak.<sup>18</sup> Since the wordings in both the provisions are different, therefore the difference is intended by the legislature. Subsection (1) refers to the law in England at the time the Civil Law Act 1956 came into force and subsection (2) refers to the law of England applicable at the time the dispute arises.

In short, the legal position in Malaysia can be summarised as follows:-

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<sup>18</sup> G.W. Bartholomew, **The Commercial Law in Malaysia : A Study in the Reception of English Law**, 1965, p. 100.



- (1) for all the states in West Malaysia the law applicable is the Sale of Goods Act 1957.
- (2) For Sabah and Sarawak the law applicable is the English law, presently the Sale of Goods Act 1979, as amended by the Sale and Supply of Goods 1994. Thus, Sabah and Sarawak are still bound by the statutory provision to apply principles of English law relating to sale of goods.

## **(II) IMPLIED TERMS UNDER SALE OF GOODS ACT 1957**

### **(a) IMPLIED CONDITION OF TITLE**

The implied terms under the Sale of Goods Act 1957 are those terms implied originally under the Sale of Goods Act 1893. As an example, under section 14 (a), which is equivalent to section 12 of the 1893 Act, unless a different intention is shown in the contract, there is an implied condition on the part of the seller, that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass. There are two limbs to this section. The first one is on sale where the seller is to have title at the time of the contract. The second limb concerns an agreement to sell. In that situation the seller need not necessarily have title at the moment of the contract but rather at the time when property is to pass. In the English case of *Butterworth v. Kingsway Motors*

*Ltd.* (1954)<sup>19</sup> the seller, who was actually the hirer of a car under a hire-purchase contract, sold it to A who resold it to B. B then resold the car to the defendants. The car was bought from the defendants by the plaintiff, who had used it for several months before being told that it was the property of the finance company which let the car on hire-purchase to the hirer. The plaintiff repudiated the contract and claimed for the return of the purchase price on the ground that there had been a total failure of consideration. A week later the hirer paid the finance company the outstanding amount. The court held that the plaintiff had the right to the return of the purchase price because the hirer had no title to the car. But insofar as the intermediate buyers were concerned, they had not rescinded the contract and the acquisition of title by the hirer had served to feed back their title.

This principle of "feeding the title" was accepted in the Malaysian case of *Ng Ngat Siang v. Arab-Malaysian Finance Bhd. & Anor.* (1988).<sup>20</sup> The plaintiff agreed to buy a car from the second defendant who had not yet gained title to it as it was claimed by MUI Finance, the company which helped finance the purchase of the car by the second defendant. Because of this, ownership in the car could only be transferred to the plaintiff once the whole amount due under the hire-purchase contract was paid. This money was to come from the sale of the car to the plaintiff. The plaintiff paid the

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<sup>19</sup>[1954] 2 All ER 694.

<sup>20</sup>[1988] 3 MLJ 319.

full price and all that was left to do was for the second defendant to transfer ownership to the plaintiff. He instead sold the car to A, who was financed by the first defendant. In this case the plaintiff applied to court for a determination as to who had a better title to the car. The court held that after the full payment by the second defendant to MUI Finance, ownership vested in him and the title so acquired enured to the benefit of the plaintiff as the purchaser of the car. In this case the judge considered two instances in the transaction: one before the pay-off and the other after the pay-off. In the former situation, the second defendant as hirer had no title to the car because it was claimed by MUI Finance. But after he had paid off MUI Finance, the endorsement of ownership claim by the finance company was cancelled. Title is vested in the second defendant. In turn, he should deliver the car to the plaintiff instead of A.

Mere suspicion that the goods are stolen does not mean that section 14 (a) is breached. In *Ahmad Ismail v. Malayan Motors* (1973)<sup>21</sup>, which is actually a hire-purchase case, the plaintiff bought a car from the first defendants who were dealers in second-hand cars. Unable to pay the whole purchase price, he obtained help from the first defendants who were the finance company. After fourteen months, the car was detained by the police on the suspicion that it was stolen property. The plaintiff thereupon terminated the hire-purchase agreement on the ground that the first defendants had no title to pass and therefore were in breach of the implied condition

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<sup>21</sup> [1973] 1 MLJ 117

under section 6(1)(b) of the Hire-Purchase Act, 1967. (This provision is equivalent to section 14(a) of the Sale of Goods Act 1957). It was held by the court that since as a matter of fact the car was not a stolen car, therefore there could be no question of the owner not being able to transfer good title to the plaintiff at the time when the property was to pass. As such, the plaintiff's claim for damages for breach of the implied condition must fail.

In contrast to the above case is the case of *Heng Leong Motor Trading Co. v. Osman bin Abdullah* (1994)<sup>22</sup> an issue inter-related with that of title was discussed, i.e. the warranty of quiet possession. What happened in this case was that the respondent bought a van from the appellant (dealer) and paid RM5,500 as deposit. The balance of RM8,000 was financed by Affin Credit (M) Sdn. Bhd. whereupon a hire-purchase agreement was entered between this finance company and the respondent. After the payment of the amount due under the agreement, the registration card was returned to the respondent. Subsequently, the van was seized by the Royal Customs and Excise Department on the ground that it was material evidence in a customs case under investigation regarding its import. The respondent brought an action against the appellant (dealer) for breach of the implied condition of the dealer's right to sell, and to give possession and sole and exclusive use and benefit of the van.

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<sup>22</sup>[1994] 2 MLJ 456.

At first instance judgement was given in favour of the respondent and there was an appeal against that decision. Dismissing the appeal, the court held that there was a clear breach of the implied warranty of quiet possession of the van under section 12(2)(b) of the UK Sale of Goods Act 1979 due to the lawful seizure of the van by the Customs and Excise Department. The warranty protects the buyer against the act of the seller as well as that of the third party. If the buyer's possession of the goods is in any way disturbed, he is entitled to hold the seller liable and to be indemnified by him.

#### **(b) SALE BY DESCRIPTION**

By virtue of section 15, where there is a contract for sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. Like its English counterpart, sale by description includes all contracts for sale of unascertained goods whereby the buyer has not seen the goods but relied on the description of it by the seller. In *Nagurdas Purshotumdas & Co. v. Mitsui Bussan Kaisha Ltd.* (1911)<sup>23</sup> the parties had conducted previous dealings for the sale of flour in bags bearing a well-known trade mark. A further order of the flour, described as "the same as our previous contracts", was made. Flour of the same quality was delivered but, however, did not have the same trade mark. The court held that there was a

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<sup>23</sup> (1911) 12 SSLR 67.

breach of the implied condition of description. Where goods were unascertained and sold by mere description of them, when delivered they should conform to their description.

In a Singapore case, *Harrisons & Crosfield (N.Z) Ltd. v. Lian Aik Hang (Sued as a Firm)* (1987)<sup>24</sup>, the plaintiffs and the defendants entered into two written contracts for the sale of 314 metric tons of peanut kernels of 60/70 pieces per ounce TBS (Thai Brown Skin) to be packed in new jute bags C & F Auckland. The peanut kernels were to be from the "1980 Thailand Crop". When the goods arrived in Auckland, the plaintiffs rejected them on the grounds that (a) they did not correspond with the sample; (b) that they were not from the "1980 Thailand Crop" but from an older crop and therefore were not in compliance with description; and (c) that they were not fit for human consumption by reason of mould aflatoxin<sup>25</sup> and infestation by insect and therefore were not merchantable. The court held in favour of the plaintiffs in that there was a breach of section 15 of the Sale of Goods Act 1979. The court was not satisfied that there had been a satisfactory and adequate sampling of the goods. Neither was the court convinced that the peanuts were from the 1980 harvest. The defendants had bought the peanut kernels from a Thai company, and from the evidence given at the

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<sup>24</sup>[1987] 2 MLJ 286.

<sup>25</sup>In his judgement the judge explained the nature of aflatoxin i.e. they are toxins produced mainly by mould known as *Aspergillus Flavus*. The mould, which are found on peanut kernels, is a living organism and it proliferates and produces toxins in moisture and under favourable physical, chemical and biological conditions. ( p. 288)



trial, it seemed that the 1980 harvest was still in the process of being harvested and dried when the peanuts were delivered from Bangkok to the defendants. Therefore it would be impossible that the crops consigned by the defendants to the plaintiffs were of the 1980 harvest. Finally on the question of the presence of aflatoxin and infestation of the peanut kernels, the court found that it was far above the permitted limits.

### **(c) FITNESS FOR PURPOSE**

Section 16 (1) of the Sale of Goods Act 1957, like its predecessor, expressly preserved the common law principle of caveat emptor. The opening words of the section state that "there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale", and it goes on to prescribe the circumstances in which there will be an implied condition that the goods are fit for a particular purpose and also of merchantable quality. This section actually provides for the exceptions to the rule of caveat emptor. Section 16 (1) (a) implies that goods must be fit for a particular purpose for which they are bought provided that certain conditions are satisfied. These conditions are:-

- (1) The buyer must have made known to the seller the particular purpose for which the goods are bought.
- (2) There must be reliance by the buyer on the seller's skill and judgment.
- (3) The goods must be of the description which it is in the course of the seller's business to supply, and this would exclude a private sale.

- (4) The goods must not be sold under a trade or patent name, for this would negate reliance on the seller.

In *Khong Seng v. Ng Teong Kiat Biscuit Factory Ltd.* (1963)<sup>26</sup> the plaintiff claimed for the price of 219 tins of tallow supplied to the defendants at the request of the latter. The defendants denied the claim, stating among other things that the tallow supplied was of an inferior quality and was not fit for the purposes for which it was supplied. The plaintiff orally warranted that the tallow would be of a quality fit for the manufacture of biscuits and free from defects and faults. The defendants alleged that they had used 15 tins to manufacture over 22 tins of biscuits, of which none were saleable and for this the defendants counter-claimed. The court held that the plaintiff's claim must fail and that there was a breach of the implied condition under section 16 (1) (a) which entitled the defendants to repudiate the contract. There had been previous dealings between the parties and the plaintiff knew that the defendants required the tallow for the manufacture of biscuits. The plaintiff contended that he was not in the business of supplying goods of that description because he was a meat seller. The court however said that even though the parties described the goods as tallow, in reality it was melted beef fat and the plaintiff himself admitted that he extracted the fat from the beef and turned it into tallow and sold it separately. Therefore, tallow was goods of a description which it was in the course of the plaintiff's business to supply.

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<sup>26</sup> (1963) 29 MLJ 388

If a presumption can be made in the above case that the plaintiff was actually a vegetable seller, could it be said that the tallow was goods of a description which it was in the course of his business to supply? If the goods were of a similar kind, then the provision will cover it<sup>27</sup>. Under English law, this problem is eliminated because the buyer need only prove that the seller is in the course of a business. It is no longer necessary to show that the goods are of a description which it is in the course of the seller's business to supply.

Under the subsection it must also be shown that the buyer relied on the seller's skill and judgement. Reliance will be implied if the buyer made known to the seller the purpose for which the goods are required. In *Deutz Far East (Pte) Ltd. v. Pacific Navigation Co. Pte. Ltd.* [1990]<sup>28</sup> the plaintiffs were manufacturers and suppliers of Deutz marine engines and spare parts. They sold to the defendants a new top part of the injector pump (NTP) to be used on the main engine of the defendants' ship. This action was for the recovery of the price. The defendants counterclaimed that the goods supplied were defective and that it had caused extensive damage to the ship, which resulted in the defendants suffering a great loss in repairing it. It was contended that the long and thicker springs and the shorter retaining nuts installed in the NTP

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<sup>27</sup>*Spencer Trading Co. Ltd. v. Devon* [1947] 1 All ER 284.

<sup>28</sup>[1990] 1 MLJ 65.

supplied by the plaintiffs were the cause of the breakdown of the engine in the ship. After considering all the evidence, the court decided that the long springs and the short retaining nuts were the cause of the engine failure. The court was also satisfied that the defendants relied entirely on the plaintiffs to supply a NTP which could be used with the engine which was on the defendants' ship. The wrong combination of the springs and nuts was a hidden and latent defect. The plaintiffs were therefore liable for the breach of the implied condition that the goods must be fit for their particular purpose.

In *Associated Metal Smelters Ltd. v. Tham Cheow Toh* [1972]<sup>29</sup>, the plaintiffs bought from the defendants a metal melting furnace and they had given an undertaking that the furnace would have a temperature of not lower than 2,600 degrees F. The furnace supplied by the defendants did not however meet the required temperature. It was argued that they had built the furnace according to the specification given by the plaintiffs. Therefore, if it could not produce the kind of temperature required, the defendants were not at fault. The court held that the defendants had given an assurance that the furnace was capable of producing a temperature of not lower than 2,600 degrees F. This amounted to a breach of the condition of the contract. Furthermore, being manufacturers of furnaces, they should know that to produce a furnace capable of producing the specific temperature they could not only rely on the

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<sup>29</sup>[1972] 1 MLJ 171.

specifications but also on their skill and knowledge. Judgment was given for the plaintiffs and the defendants appealed. The appeal was dismissed on the ground that the trial judge was correct in finding that the breach amounted to a breach of condition. The plaintiffs in this case waived their right to treat the contract as repudiated and instead claimed damages.

The issue of fitness was once again raised in the recent case of *Union Alloy (M) Sdn. Bhd. v. Syarikat Pembinaan Yeoh Tiong Lay Sdn. Bhd.* (1993)<sup>30</sup>. The plaintiff and the defendant entered into a contract for the sale of an ACE Skyrak Passenger/Material Hoist Model MK 25. While being used to transport two workmen to the twenty-first storey of the building under construction, the machine crashed to the ground, killing one of the workmen and seriously injuring the other. In this action the plaintiff sued the defendant for the balance of the price and in its defence the defendant contended that the plaintiff was in breach of the conditions as to description, fitness and merchantability implied under sections 15 and 16 (1) (a) and (b) of the Sale of Goods Act 1957. It was argued that the accident was due to the fact that the machine was not fit to be used for the particular purpose of carrying people and construction materials. The issue before the court was whether the plaintiff was in breach of these terms as alleged by the defendant. The court was satisfied that there

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<sup>30</sup>[1993] 2 AMR 2021.

was nothing in the evidence to suggest that the machine did not conform to the contract description and the brochure. Therefore there was no breach of section 15. With regard to the warranty of fitness, the court found that the machine, which had only one purpose, i.e. transportation of men and materials at a construction worksite, was able to be used for that particular purpose. From the evidence given by witnesses, the court was satisfied that the accident had occurred not because the machine was unfit, but for other reasons. Firstly, it had not been properly installed in that it was supposed to be installed to reach a height of 30 metres, but had been installed to reach 55 metres. Secondly, once installed the machine required to be properly maintained and this had not been done by the defendant. Finally, the installation and the use of the machine was not reported to the Factories and Machinery Department and as such no certificate of fitness was issued for the use of the machine. These were requirements under section 19 (1) of the Factories and Machinery Act 1967 and Regulation 10 of the Factories and Machinery (Notification, Certificate of Fitness and Inspection) Regulations 1970.

#### **(d) MERCHANTABLE QUALITY**

The implied condition of merchantable quality is provided for in section 16 (1) (b) of the Sale of Goods Act 1957. It provides that "where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not) there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied



condition as regards defects which such examination ought to have revealed." In this particular section it is not a requirement that the buyer made known to the seller the particular purpose for which the goods were bought. For so long as the goods are bought by description and the seller is someone who deals in goods of that description, thus excluding a private sale, there is the implied condition that the goods must be merchantable. In the United Kingdom, by the Supply of Goods (Implied Terms) Act 1973 this section has been changed to read "where the seller sells goods in the course of a business ....." This change meant that the implied term does not apply only to sale by description, but would also include a sale by a seller who has never sold goods of that kind before<sup>31</sup>.

As to what is meant by merchantable quality, the local Act has not given it any definition. Therefore, to decide whether goods are merchantable or otherwise, factors like price, description and fitness for purpose have to be considered. According to **Halsbury's Laws of England**,

"In relation to pre-1973 contracts i.e. under the Sale of Goods 1893, as a general rule, goods were of merchantable quality if in the form in which they were tendered they would be used by a reasonable man for some purpose for which goods of the same quality and same general character and designation would normally be used, so as to

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<sup>31</sup>Beatrix Vohrah & Wu Min Aun, **The Commercial Law of Malaysia**, p. 206.

be saleable under the description by which they were sold at a price not substantially less than the contract price."<sup>32</sup>

In the case of *Seng Hin v. Arathoon Sons Ltd.* (1968)<sup>33</sup> the defendants sold tapioca flour to the plaintiffs for shipment to buyers in Germany. Prior to the delivery, the defendants had marked these bags on both sides with their own distinguishing mark, consisting of Chinese lettering in red ink, using a red dye on stencil on the outer cover of the jute bags. This had been their practice for the past seventeen years in selling tapioca flour. It should also be noted that for the preceding eight years the plaintiffs had been buying tapioca flour from the defendants and on five occasions had sold it to the same German buyers without complaint. Upon arrival in Germany the tapioca flour was found to be discoloured, due to the fact that the red dye had penetrated the jute and come in contact with the tapioca flour. Upon examination, it was found that the red coloured dye was prohibited in Germany and the court of first instance held that the tapioca flour was not fit for human consumption and therefore was not merchantable. Judgment was given for the plaintiffs. The defendants appealed on the following grounds:-

- (1) that the trial judge erred in fact and in law in holding that the tapioca flour was of unmerchantable quality because it was not

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<sup>32</sup>Halsbury's Laws of England, vol. 41, 4th. ed. 1983, para. 694, note 3.

<sup>33</sup>[1968] 2 MLJ 123.

saleable as tapioca flour to be used for human consumption and starch. There was no evidence that the tapioca flour was unsaleable as starch.

- (2) that the trial judge paid little attention to the fact that only the part that came in contact with the red dye became discoloured. There was no evidence that the discoloration occurred to the rest of the flour in the bags.

The Federal Court opined that the appellants' contention was well-founded and held that in order to show that the goods were not of merchantable quality it had to be demonstrated that the goods were of no use for any purpose for which such goods would normally be used and were therefore not saleable under that description. In this case the plaintiffs had failed to show that the tapioca flour was of unmerchantable quality under English law. Although the flour may not have been in perfect condition it was, on the evidence, at least saleable as starch. Furthermore it was not found to be unfit for human consumption under the law of Singapore except in Germany because the red dye was of a prohibited kind. The defendants' appeal was therefore allowed.

In this case, the plaintiffs also raised the implied condition of fitness for a particular purpose, but the court held that since sale was by trade name, the proviso applied and the implied term was ousted. In arriving at his decision, the judge found that the tapioca flour was condemned as unfit for human consumption and prohibited for sale

purely under German law. There was nothing in evidence to show that it was unmerchantable under English law. But if the above case were to happen in England now, the decision would probably be different following the 1994 Act. Under the new Act, merchantability of the goods also includes its appearance. Since the tapioca flour had become discoloured after coming in contact with the red dye, it could be said that it was no longer merchantable because it did not appear as tapioca flour should look.

In *Lian Huat & Co. (Pte) Ltd. v. Megah Commercial Co.* (1978)<sup>34</sup> by two separate written contracts, the defendants agreed to purchase from the plaintiffs 10 metric tons of Singapore nutmegs BWP (contract 1) and 40 metric tons of Papua nutmegs BWP and 10 metric tons of Papua nutmegs ABCD (contract 2). Contract 1 was a sale by sample whereby the defendants were shown a sample of the Singapore nutmegs before the contract was signed. There was no sample in contract 2. There was a provision in the contract that "buyers shall nominate their own representative to supervise the quality and weight at seller's store before taking delivery". Subsequently, when the plaintiffs were ready to deliver, the defendants refused to accept the goods on the grounds that under contract 1 the nutmegs were not of quality, and under contract 2 the nutmegs were not up to "international quality". The court held that the allegation that the nutmegs were not of international quality was not true. Under contract 2 the defendants agreed to buy Papua nutmegs ABCD and not nutmegs of

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<sup>34</sup>[1978] 2 MLJ 51.

"international quality". What was delivered was Papua nutmegs ABCD, and they were saleable as Papua nutmegs ABCD; therefore there was no breach of the contract. Had the defendants contemplated buying nutmegs which were internationally saleable, this should have been made known to the plaintiffs. Even though this case involved a contract for sale of goods, the Sale of Goods Act was not raised because the plaintiffs' claim was based on the breach of an express term of the written contract.

#### **(e) SALE BY SAMPLE**

A contract of sale is a contract for sale by sample if, either expressly or impliedly, it was agreed between the parties or intended by them to be so<sup>35</sup>. Without agreement or intention a sale is not a sale by sample, even though a sample is provided for examination by the buyer. Samples are usually used in the sale of bulk goods like rice, wheat, flour, or in household goods like tiles, carpets, etc. They are usually a small fraction of the thing offered for sale shown to the buyer in order to describe the thing to him. In the classic statement of Lord MacNaghten:-

"the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract which, owing to the imperfection of the language, it may be

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<sup>35</sup>Section 17 (1).

difficult or impossible to express in words. The sample speaks for itself."<sup>36</sup>

Section 17 (2) provides that where there is a contract of sale by sample there is an implied condition that (a) the bulk shall correspond with the sample in quality; (b) the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and (c) the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. These are independent conditions and breach of any one of them will entitle the buyer to reject the goods and treat the contract as repudiated.

Under subsection (2) (a) the bulk of the goods must correspond with the sample in quality. If the bulk has got to undergo some minor process in order to make them comply with the sample, that would mean that the above provision is breached. In the case of *E.S. Ruben Ltd. v. Faire Bros Ltd* (1949)<sup>37</sup> the judge said that there is no compliance with the contractual obligation if the article delivered is not in accordance with the sample but which can by some simple process be turned into an article which is in accordance with the sample<sup>38</sup>.

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<sup>36</sup>*Drummond v. Van Ingen* [1887] 12 AC 284, at p. 297.

<sup>37</sup>[1949] 1 KB 254.

<sup>38</sup>*id.* p. 260.



In the case of *Lau Yaw Seng v. Cooperative Ceramica D'Imola* (1991)<sup>39</sup> the plaintiff ordered from the defendant a quantity of tiles after he had seen the sample exhibited at a ceramic fair in Spain. Agreement was entered into and the payment was by way of an irrevocable letter of credit. When the goods were delivered, the plaintiff found that they were not of the same quality as the sample and they were not fit for their purpose and nobody would buy them. The plaintiff required the defendant to take back the tiles but they delayed in their response. The plaintiff alleged that the defendant had been fraudulent and the delay was deliberate in order to wait for the maturing of the letter of credit. The plaintiff applied for an interim injunction to stop the bank from paying against the letter of credit and this was served on the bank. The court held that the plaintiff, when alleging that there was fraud, had to prove it and in this instance that burden had not been discharged. The court opined that on the facts of the case what was in dispute was the performance of the contract, i.e. the quality of the goods shipped by the defendant to the plaintiff. What was shipped was tiles, though not of the quality or standard the plaintiff alleged that he saw in Spain.

What the plaintiff should have done in this case was to base his claim on section 17 (2) (a) rather than on fraud. Had he relied on that section he need only have shown that the sale was sale by sample and the bulk of the goods delivered was not of the same quality as the sample. If this could be proved, then the defendant was in breach

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<sup>39</sup>[1991] 1 MLJ 393.

of an implied condition which would give the right to the plaintiff to reject the goods tendered.

The buyer has the right to compare the bulk of the goods with the sample and for the purpose of such comparison, he has the opportunity to inspect the goods. Opportunity of inspection or examination is also given with regard to the sample and any defects which could not be discovered upon reasonable inspection of the sample will render the goods unmerchantable if the defect later becomes apparent.

### **(III) WEAKNESSES IN THE LAW**

As we have seen above, sale of goods in Malaysia is still governed by the Sale of Goods Act 1957, which is basically the 1893 English Act. It is, therefore, not surprising to see that Malaysia is now facing the same problems that England once had. These problems concern mainly the implied terms and related issues, i.e., the right of contracting out by the seller. Among the problems of the implied terms are:-

- (1) Section 15 (sale by description), which, although it appears to be simple, conceals a real difficulty. The development of case law in Malaysia and in England and other common law countries generally, seems to be expanding this concept to the extent that it has become difficult to reconcile it with the exact words of the section. It originally started as applicable only to the

sale of future or unascertained goods which the buyer had not seen<sup>40</sup>. Then it extended to sale of goods displayed before the buyer for so long as it was bought relying on the description<sup>41</sup>. As such, every sale could be a sale by description just because the buyer buys the goods relying on the description given by the seller.

(2) Section 16(1)(a) (fitness for a particular purpose) has a proviso which is similar to the old section 14(1) of the 1893 Act. This proviso excludes the application of implied condition of fitness for purpose if the goods are sold under a trade or patent name. Present day commerce is very much promoted through advertisements and this is the most effective way of reaching consumers. Goods are almost if not always sold and bought under their trade or patent name. Pursuant to this proviso, it would follow that the implied term will almost never be applicable.

(3) The defects found in section 16(1)(b) (merchantable quality) are numerous. It only applies where goods are sold by description; the seller must deal in goods of that description; and an opportunity to inspect will exclude the implied term with regard to defects which such examination ought to have

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<sup>40</sup>See chapter 4.

<sup>41</sup>*Grant v. Australian Knitting Mill* [1936] AC 85.

revealed<sup>42</sup>. But the major problem raised by this section is that there is still no definition of the term "merchantable quality". If we refer back to the case of *Seng Hin v. Arathoon Sons Ltd.* (1968),<sup>43</sup> the court held that tapioca flour was still merchantable despite the fact that it was discoloured and not resaleable in Germany for human consumption. Because it was still fit for use as starch, the fact that it was not fit for human consumption did not make it unmerchantable. The court placed too much emphasis on purpose rather than anything else.

- (4) Section 62 of the Malaysian Act gives the seller the right to exclude the implied terms provided for in the Act. This section as such takes away with the left hand what was given by the right hand with regard to the implied term provided for in sections 14 - 17. Section 62 is equivalent to the old section 55, which in the United Kingdom was amended by the Unfair Contract Terms Act 1977. This section preserves the laissez faire tradition whereby the parties are free to contract on whatever terms they desire, provided that such terms are not unlawful or prohibited by law. This theory represents the free market economy and the spirit of competition<sup>44</sup>. This

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<sup>42</sup>See chapter 5.

<sup>43</sup>[1968] 2 MLJ 123. See above, at note 33.

<sup>44</sup>Atiyah, *An Introduction to the Law of Contract* (1989), p. 289 - 92; *Rise and Fall of Freedom of Contract* (1979), p. 402 - 403.

attitude is also reflected in the opening words of section 14(a) of the 1957 Act and section 11, on stipulation as to time, whereby it begins with the phrase "unless a different intention appears from the terms of the contract". From the viewpoint of a consumer, who does not have the equal bargaining power with the seller, the Act does not actually provide much protection to him. The seller usually has greater bargaining power in negotiating with the individual buyer, and will usually try to safeguard his interest by excluding liability in relation to the goods sold.

Despite the antiquity and the inadequacies of the Sale of Goods Act 1957, the decisions of the Malaysian have not been unjust nor are they odd from the commercial point of view. The reason why the cases are "justly" decided is because the Malaysian courts have been relying on the English cases. For example in the case of *Seng Hin v. Arathoon Sons Ltd.* (1968), the English cases of *Cammell Laird & Co. v. Manganese Bronze* (1934)<sup>45</sup> and *Bartlett v. Sydney Marcus Ltd.* (1965)<sup>46</sup> were referred to. This practice has given rise to another more general problem where English authorities will override the written law of the country. To take an example, in a case involving the issue of merchantable quality of the goods, the court will be referred to cases such as *Rogers v. Parish (Scarborough) Ltd.* (1987)<sup>47</sup> and

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<sup>45</sup> [1934] AC 402.

<sup>46</sup> [1965] 1 WLR 1013.

<sup>47</sup> [1987] QB 933.

*Bernstein v. Pamson Motors (Golders Green) Ltd.* (1987).<sup>48</sup> We know, following these cases, that “merchantability” brings into consideration many external factors. So, when the Malaysian court decides based on these authorities, then the term “merchantability” will be expanded beyond the scope of the Sale of Goods Act 1957.

Nevertheless, knowing and understanding the problems with the Sale of Goods Act 1957, the important question that arises now is, what should be the approach to reform of the law of sale in Malaysia? The same three options open to other jurisdictions are also open to Malaysia, that is, should we retain the present structure and amend where necessary; or should we adopt Article 2 of the Uniform Commercial Code; or should we have a new Act but borrow heavily from Article 2?

If we adopt the first approach, it means that we are retaining the present structure of the law, that is in the form of an Act. If the second approach is taken, it means that we will be changing the whole structure of our law into a Code. Sale of goods legislation in Malaysia, United Kingdom, Australia and New Zealand is in the form of an Act, unlike the USA law. Which is a Code. There are some differences between an Act and a Code. Although both are promulgated by the legislature, typically they differ greatly in their preparation, scrutiny, style and content. A Code is designed to cover all leading rules in a particular field and to express these with great degree of

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<sup>48</sup> [1987] 1 All ER 220.



generality and a tighter integration than an ordinary statute. Secondly, an Act is prepared by legislative draftsman who are highly skilled at a technical level but are unlikely to have any prior conversance with the field. A Code is drafted by experts, whose mastery of the subject over many years study gives them a complete picture of the field as a whole and of major weaknesses in the structure and content of the law. Finally, before the text of a Code is turned into law, the draft is submitted to stringent scrutiny of many individuals and organisations drawn from a wide range of expertise and undergoes long and continual process of testing and re-testing, shaping and re-shaping and drafting and re-drafting.<sup>49</sup>

#### **(IV) PROPOSALS FOR REFORM**

Of the three alternative approaches presented above, the third one seems to be most attractive for adoption in Malaysia; that is, to have a new Act but to borrow not only from Article 2 of the Uniform Commercial Code but also from the reformed English law. Article 2 traces its origin in many respects to the Sale of Goods 1893; as such, despite important differences, one can still be easily familiar with it. This approach will, therefore, also reflect continuity in the law. However, the adaptation of Article 2 will not be in toto. These will be some of the proposals for reform.

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<sup>49</sup> Goode, "The Codification of Commercial Law", 1988, *Monash University Law Review*, p. 135 at p.139.

(1) Do away with the implied terms of description and fitness for a particular purpose and fall back on the ordinary concepts of express and implied terms under the general contract law. It is not necessary to have terms implied by law when they are already expressly stated or can be implied from the circumstances and from trade usage. For example, if the seller described certain goods as having certain attributes or qualities, it is expected that the goods should comply with whatever that have been said about them. There is no need to imply that the goods will correspond with the description because that description has become an express term of the contract of sale. Similarly, if a buyer requires goods for a particular purpose, it would be obvious that he should communicate that purpose to the seller, and that this can amount to an express term. Communication can be evidence of reliance on the seller's skill and judgment. If the goods cannot be used for that purpose, the seller, who is in the business of selling such goods, is in breach of the contract of sale. By doing this, effect is given to section 31 of the 1957 Act, which provides that it is the duty of the seller to deliver the goods and for the buyer to accept and pay for them in accordance with the terms of the contract of sale.

(2) Repeal the provision on "merchantable quality" and replace it with the concept of "satisfactory quality" or "acceptable quality". The United Kingdom Law Commissions in their 1987 report used the term "acceptable quality" in place of "merchantable quality", but the Sale and Supply of Goods Act 1994 uses the word

“satisfactory quality”. The reason is because the term “acceptability” is bound to cause trouble. If a reasonable person would not accept goods with minor defects or blemishes in appearance and finish, having regard to the price and other circumstances, the goods will be rendered unacceptable. But in a sale of a second-hand car, such blemishes are almost certainly present and no reasonable person would regard it as making the car of unacceptable quality. There can even be an instant where there is a non-complaining buyer who might decide that goods were of acceptable quality even if by objective standards, they were not satisfied. For this reason, the Act prefers the phrase “satisfactory quality” to “acceptable quality”. In New Zealand, however, the Consumer Guarantees Act 1993 uses the term “acceptable quality”, which is determined by having regard to the fitness for the purpose for which the goods are commonly supplied, acceptability in appearance and finish, freedom from minor defects, safety and durability. Except for the first factor, the rest are similar with the factors mentioned in the 1994 English Act. The difference in the English Act is that, it must be fitness for all the purposes for which goods of the kind in question are commonly supplied. It seems that in the United Kingdom, it refers to the kind of goods which may have more than one common purpose; and they must be fit for all these purposes before they can be considered as having a satisfactory quality. Under the New Zealand provision, it refers to the purpose which the goods are commonly supplied. Thus, the old formula of fitness for purpose is still of great relevance to be considered together with other factors mentioned therein.

(3) Strike out the distinction between “condition” and “warranty” and maintain the concept of terms of the contract as understood in the ordinary contract law. After all sale of goods is basically a form of contract entered into with the consensus of the parties. The remedies available will not be dependent on whether the breach is of a “condition” or a “warranty” but rather whether the breach is material or not. On this point, Scottish law can be referred to. In Scotland it is provided in the 1994 Act that:

Section 5 - 15B (1) Where in a contract of sale the seller is in breach of any term of the contract (express or implied), the buyer shall be entitled

- (a) to claim damages, and
- (b) if the breach is material, to reject any goods delivered under the contract and treat it as repudiated.

A breach is material under the Act -

Where a contract of sale is a consumer contract, then, for the purposes of subsection (1)(b) above, breach by the seller of any term (express or implied) –

- (a) as to the quality of the goods or their fitness for a purpose,
- (b) if the goods are, or are to be, sold by description, that the goods will correspond with the description,
- (c) if the goods are, or are to be, sold by reference to a sample, that the bulk will correspond with the sample in quality,

It is important to note that the above position applies only to consumer contracts because a consumer requires greater protection than non-consumers. A consumer almost always buys goods for domestic use or consumption and not for purpose of making profits. As such, he will not be happy with defective goods. When he buys perfect goods he expects perfect goods. A consumer is not in a position to easily dispose of defective goods, as such he has no choice but to keep it and claim damages. However, damages in monetary term will be difficult to assess if the defect is minor. A seller is in a stronger bargaining position than the consumer so much so that the latter may have to drop his claim or accept less than his due.

- (4) As for exemption clauses, there must be legislation along the same lines as the Unfair Contract Terms Act 1977, as well as the rules laid down in the EC Unfair Terms Directive. This will help to control the insertion of exemption clauses. Besides that, section 62 of the 1957 Act must be amended to conform with section 55 of the Sale of Goods Act 1979.

## **(V) CONCLUSION**

It is a fact that the Sale of Goods Act 1957 is an archaic piece of legislation flavoured by nineteenth-century social, economic, political and philosophical influences on English judicial thinking of that time. There has been a rapid development in commerce

in Malaysia since 1957 and this means that new transactions must be controlled by a new business regime. There has been some effort by the government in Malaysia to move towards greater protection of consumers. The Direct Sales Act 1993 regulates door-to-door and mail order sales. The main provisions of this Act are that the consumer can only be approached during specific times and he has the right to void a purchase within a "cooling-off" period. This is to protect the consumer from being pressurised by salesman into buying something which he does not need. Pressure sales tactics are common in this kind of merchandising. Other relevant legislation for consumer protection includes the Trade Description Regulations (Cheap Sales) (Amendment) 1993, under the Trade Description Act 1972 which requires retailers to obtain a licence before running a cheap sale. The Price Control (Indication of Price by Retailers) Order 1993 under the Price Control Act 1946 requires that all retailed goods are price-tagged so that a consumer can check out the price for himself without any commitment to the sales person. By this it is hoped that consumers will not suffer at the hands of the sellers whose only interest is to make a profit. It is hoped that more laws will be passed in the near future to further safeguard the interest of consumers.<sup>50</sup>

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<sup>50</sup> Recently the Parliament passed the Consumer Protection Act 1999, which is based on the New Zealand's Consumer Guarantees Act 1993.



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